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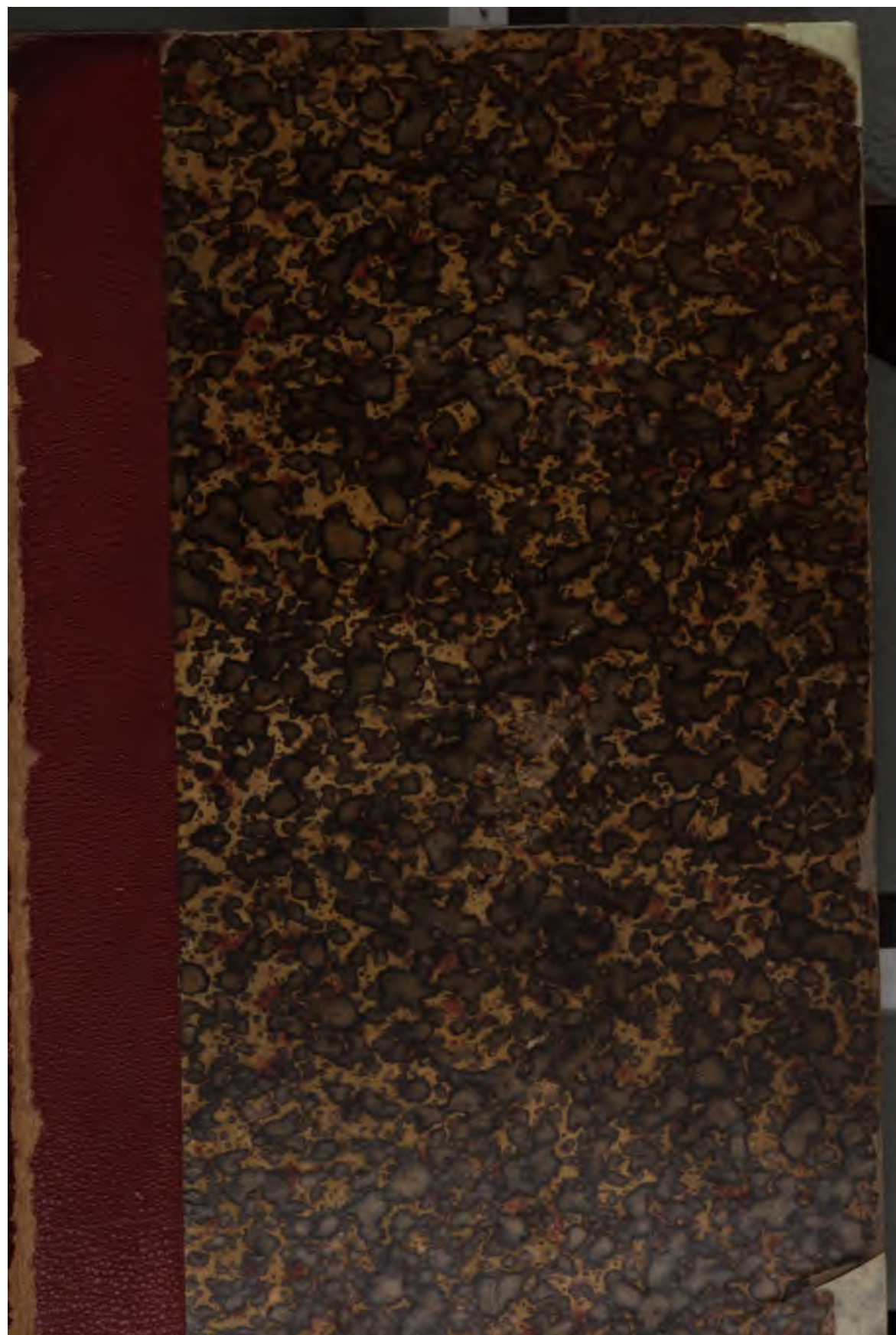
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THE  
DOMESTIC AND FOREIGN RELATIONS  
OF THE  
UNITED STATES.

BY JOEL PARKER.

CAMBRIDGE:  
WELCH, BIGELOW, AND COMPANY.  
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1863, Jan. 7.  
Gift of  
Rich<sup>d</sup>. Henry Dana Jr.  
Cambridge.  
(H.C. 1537.)

MEMORANDUM. — The substance of the first part of the following Tract was contained in a Lecture delivered to the students in the Law School of Harvard College, by the author, as Royall Professor of Law in that Institution, on the 25th of June, 1861. Subsequent events have led to an enlargement of it, and to its publication in the January number of the North American Review. It is now issued as a separate Article, a single paragraph being omitted because it was little more than a repetition of what was expressed elsewhere, and some Notes being added in an Appendix.

CAMBRIDGE, January 1, 1862.

# THE DOMESTIC AND FOREIGN RELATIONS

OF THE

## UNITED STATES.

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It may be stated as a result of our examination of the alleged Right of Secession, that the people of the several States composing the United States, under the Constitution, — whether that instrument be regarded as an organic law, or as a compact, — form an entire Nation, for the purposes for which they are thus united; while under their State organizations they exercise many powers of sovereignty, of a political and municipal character, some of which are subordinate to the powers of the General government, and others independent of that government because they do not fall within the scope of the purposes for which it was organized, and all “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

This nation has, for the accomplishment of the objects of its existence, all the attributes of sovereignty. The Constitution — providing that itself shall be the supreme law of the land, and binding upon all the judges of the several States, anything in the constitution or laws of any State to the contrary notwithstanding; requiring all the legislators, and executive and judicial officers of the United States, and of the several States, to take an oath or affirmation to support it; and defining what



shall constitute treason against the United States—shows that, so far as the objects and purposes of the national government extend, an allegiance is due to that government from all the citizens within its limits, paramount to and exclusive of any allegiance due to the several States ; because the allegiance to the State arises under the State organization and constitution, which, to the extent covered by the Constitution of the United States, are subordinate to the authority of the United States, under that Constitution. There can be, therefore, no right on the part of any State, or of the people of any State, through or by any State authority or action, or by any popular vote, to terminate this allegiance to the United States.

The Union under the Constitution being perpetual and indissoluble, it is to be subverted only by the exercise of the right of revolution, for sufficient cause. And this right of revolution is a personal, and not a State right, and of an imperfect character ; for an attempt at revolution is legally, in its inception, and until it is attended with success, neither more nor less than rebellion against the existing government, which of course has at least an equal right to resist the attempt by all the forces at its command. It follows, therefore, that those persons who have been active in the attempted secession of the several States have, as respects the United States, no authority derived from any State organization ; nor any exemption, through the color of any exercise of State authority, from the ordinary consequences which attach to an insurrection or rebellion. No convention of the people of a State could confer any authority to resist the government of the United States, in the full exercise of its functions, in all of its departments, legislative, executive, and judicial ; and still less could any act of a State legislature give any color of legal authority for such resistance, whether such legislature assumed to act under the State constitution as it existed before the attempted secession, or under the authority of a convention which, having declared the secession, assumed to confer new legislative

powers, or to adopt a new constitution. All persons who have placed themselves in hostility to the United States by acts of war, are of course responsible personally for those acts, as rebels and traitors. The State which they assume to represent is not responsible, because the State, as a State, did not, and could not, in any mode, give authority to commit acts of rebellion and treason. There is no war between any State, admitted into the Union, and the United States; because the State itself—the legal, constitutionally organized State—is not in rebellion; and there is therefore no authority to confiscate the property of any State, as State property, for any such State offence. The persons who have seized upon the State organization for the purposes of rebellion, and who wield an apparent State authority for such purposes,—who have, moreover, created a confederation under this usurpation, and style themselves governors and senators, generals and captains, president and secretaries,—are in no manner shielded by their titles or offices from the punishment due to their acts of treason, which are, in fact, in more senses than one, committed on private account.

This serves to show that the proclamation of President Lincoln, treating the seizure of forts, arsenals, and dock-yards, and the bombardment of Fort Sumter, as acts of insurrection, and requiring those concerned in them to retire peaceably to their respective abodes, was not only in precise accordance with the requisition of the statute of 1795, but was founded upon the only correct legal view of the existing state of things which called it forth. The acts of hostility against the government had, perhaps, assumed such formidable proportions as to be appropriately designated as war; but it was a war of persons owing allegiance to the general or national government, and not a war of governments. Those acts were not more than acts of treason because millions were engaged in them, and they were not less than acts of treason because of the assumed titles, military and civil, or of the assumption of

State or Confederate authority, under color of which they were committed. There were millions of people in India engaged in a war against the government of Great Britain, within a short period; and most of them acted under the orders of persons who stood to them in the relation of kings and princes, for certain purposes, having recognized authority for such purposes, but who had no authority for the objects and purposes of such a war; and they were all, kings, princes, and sepoys, held alike as rebels against the paramount government,—their guilt differing only in degree, according to the circumstances of enormity attending it. We do not inquire into the causes of that revolt, when we consider the case in its political and legal aspects in regard to the United States. That is a matter between the persons engaged in it and Great Britain. The government of the United States has nothing to dread from such an inquiry, in the present instance; but other nations will not enter into that inquiry, and it is foreign to our immediate purpose.

We perceive, therefore, that the criticism upon the proclamation of the President requiring the rebels to disperse, that it addressed its command in fact to millions, and that it was preposterous to require such large numbers, like an ordinary mob, to retire to their places of abode; and that other criticism which assumed that the States were the actors in the warfare which was waged, and that the statute and the proclamation could not apply, because the States had no abodes to retire to,—fail entirely of their intended force. Rebels may form political associations for themselves, and may assume to have a government for which they ask and claim recognition. They may, as between themselves, wield the powers of a State government, if they can usurp the State authority, and use it as if they were the rightful possessors of it. They may thus have a government *de facto*, and it may be, as among themselves, *de jure* also. But all this does not change their legal relations to the government against which they are in arms, until they

have by their power accomplished the purpose of the insurrection, by a practical maintenance of their assumed independence.

We deduce from these premises the conclusion, that, as regards the United States, there is no right in any organization which these rebels and traitors have constituted — whether designated as State or Confederation — to enact a law, or to adopt an ordinance, which shall be recognized by the United States as having force or effect as a legal enactment, or as conferring upon any person power to be used in hostility to the existing government. There can be no lawful confederation of the States involved in the attempted secession, because there has been no secession of those States which is recognized as having any validity. They still remain as component parts of the United States, having doubtless a large loyal population, although the violence of the insurgents has for a time suspended the due exercise of the authority of the United States, and that of the State also, by a usurpation of the powers of the latter, and an exercise of the semblance of authority under the State organization. As States in the Union, the Constitution expressly forbids any confederation among them ; and for that reason also, if there had been no insurrection, and no attempt to array State authority against the national government, the confederation of the States would be unconstitutional ; the self-styled Congress of the Confederate States an unauthorized body ; and the so-called President of that confederation, and his cabinet councillors, suitable subjects for the criminal jurisprudence of the United States, on an indictment for a conspiracy, — if their acts of war had not made them liable to the graver penalty attached to treason.

As a necessary consequence of all this, the proclamation of Mr. Jefferson Davis, calling himself President of the Confederate States, in which he invited applications for letters of marque and reprisal against the United States, — or, in other words, in a legal view, Mr. Davis's advertisement for pro-

posals to rob, under his sanction, such citizens of the United States as might have property afloat, — was no better than the advertisement of any other private person; and the letters of marque and reprisal issued by him as President, and countersigned by R. Toombs as if he were a Secretary of State, are, as respects the United States, no better than so much waste paper, for the justification and protection of those who capture property under them. Such persons are amenable to the laws of the United States as pirates, under the act of Congress of 1790, Chapter 9.

The eighth section of that statute provides that, “if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay out of the jurisdiction of any particular State, murder or robbery, or any other offence which, if committed within the body of a county, would by the laws of the United States be punishable with death; . . . every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and, being thereof convicted, shall suffer death.” The ninth section enacts that, “if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under color of any commission from any foreign prince or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be a pirate, felon, and robber, and on being thereof convicted shall suffer death.”

The insurgents are not absolved from responsibility under this statute by the fact that their offences were committed in the course of what in other aspects may have the character of war, nor by the fact that they have been taken prisoners in that war.

Martens admits the right of the conqueror to take the lives of prisoners in three cases: —

“1. When sparing their lives is inconsistent with his own safety;



2. in cases where he has the right to exercise the *talio* or to make reprisals; 3. when the crime committed by those who fall into his hands justifies the taking of their lives." — *Summary of the Law of Nations*, Chap. 3, Sect. 4.

Vattel concedes a right to punish prisoners who have been personally guilty of some crime against the captor.

"Prisoners may be secured, and, for this purpose, they may be put into confinement, and even fettered if there be reason to apprehend that they will rise upon their captors or make their escape. But they are not to be treated harshly, unless personally guilty of some crime against him who has them in his power. In this case he is at liberty to punish them; otherwise he should remember that they are men, and unfortunate." — Book III. Chap. 8, Sect. 150.

It is by no means clear that those who come under the condemnation of this statute of 1790 by acts of force and plunder on board the Confederate privateers, would not be liable to the same condemnation under the rules of public law; for although a pirate is generally described as *hostis humani generis*, because the buccaneer ordinarily makes war indiscriminately upon the vessels of all nations, yet if a band of sea-robbers should confine their depredations to the commerce of a single nation, it would seem that, as to that nation, their crime might well be regarded as piracy, even if other nations whose commerce was not assailed did not so regard it.

It may be asked wherein consists the material difference between persons who act under a privateer's commission, and capture property on the high seas, and those who wage war upon the land, and commit homicide, and burn, destroy, or capture property there. Why should the former when taken be held and treated as pirates, and the others when captured held and exchanged as prisoners of war? It is a sufficient answer to this to say, that the war of the privateer is mainly upon the property of private persons, by private parties, for their private emolument. If the privateer attack a public

vessel, it is the exception, and not the rule ; she is not commissioned with that view. On the other hand, the war of the land forces is of a more public character, such as fighting battles offensive or defensive, assaults upon forts and batteries, and the like, and their interference with private property is usually incidental to those more direct and public operations. The object of the hostilities waged by privateers is mainly gain, by the plunder of commercial vessels ; the injury done to the enemy being only incidental to that object. The object of the military operations upon land is ordinarily the public object of the war, whatever that may be, the injury done to private property being incidental to the measures taken for that purpose. If, then, the hostilities of the privateer are not regarded as war under lawful authority, they have the character of private acts, to wit, murder and robbery.

Letters of marque and reprisal were originally granted to merchants who had lost goods by capture, in order that they might indemnify themselves by capture of the property of subjects of the offending nation. They were, and may still be, used before a war, as a means of procuring justice for a wrong or injury sustained by a nation, its citizens or subjects ; but a resort to this measure presupposes the existence of such wrong or injury.

“ When a nation cannot obtain justice, whether for a wrong or an injury, she has a right to do herself justice. But before she declare war (of which we shall treat in the following Book), there are various methods practised among nations, which remain to be treated of here. Among those methods of obtaining satisfaction has been reckoned what is called the law of retaliation, according to which we make another suffer precisely as much evil as he has done. . . . .

“ Let us say, then, that a nation may punish another which has done her an injury, as we have shown above (see Chap. IV. and VI. of this Book), if the latter refuses to give a just satisfaction ; but she has not a right to extend the penalty beyond what her own safety requires. Retaliation, which is unjust between private persons, would be much

more so between nations, because it would, in the latter case, be difficult to make the punishment fall on those who had done the injury. What right have you to cut off the nose and ears of the ambassador of a barbarian who had treated your ambassador in that manner? As to those reprisals in time of war which partake of the nature of retaliation, they are justified on other principles; and we shall speak of them in their proper place." — *Vattel*, Book II. Chap. XVIII. Sect. 339.

"Reprisals are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another,—if she refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it,—the latter may seize something belonging to the former, and apply it to her own advantage till she obtains payment of what is due to her, together with interest and damages,—or keep it as a pledge till she has received ample satisfaction." — *Ibid.*, Sect. 342.

"There are cases, however, in which reprisals would be justly condemnable, even when a declaration of war would not be so; and these are precisely those cases in which nations may with justice take up arms. When the question which constitutes the ground of a dispute relates, not to an act of violence, or an injury received, but to a contested right,—after an ineffectual endeavor to obtain justice by conciliatory and pacific measures, it is a declaration of war that ought to follow, and not pretended reprisals, which, in such a case, would only be real acts of hostility, without a declaration of war, and would be contrary to public faith, as well as to the mutual duties of nations." — *Ibid.*, Sect. 354.

"Reprisals by commission, or letters of marque and reprisal, granted to one or more injured subjects, in the name and by the authority of a sovereign, is another mode of redress for some specific injury, which is considered to be compatible with a state of peace, and permitted by the law of nations. The case arises when one nation has committed some direct and palpable injury to another, as by withholding a just debt, or by violence to person or property, and has refused to give any satisfaction." — 1 *Kent's Comm.* 61.

The principle stated in these authorities relates to reprisals as a measure of redress before the existence of a war. But

when reprisals are resorted to in time of war, for the purpose of weakening the enemy by depriving his subjects or citizens of their property, the principle that there can be no lawful reprisals until an injury is sustained is equally applicable.

Wheaton enumerates, "among the various modes of terminating the differences between nations by forcible means short of actual war," —

4. "By making reprisals upon the persons and things belonging to the offending nation, until a satisfactory reparation is made for the alleged injury."

He says : —

"Reprisals are also *general* or *special*. They are *general* when a state which has received, or supposes it has received, an injury from another nation, delivers commissions to its officers and subjects to take the persons and property belonging to the other nation, wherever the same may be found. It is, according to present usage, the first step which is usually taken at the commencement of a public war, and may be considered as amounting to a declaration of hostilities, unless satisfaction is made by the offending state. *Special* reprisals are where letters of marque are granted, in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation."

"Reprisals are to be granted only in case of a clear and open denial of justice." — *Elements of Int. Law*, Part IV. Chap. I. Sect. 1, 2.

It is one of the singular features, however, of this controversy and warfare, and one of the strange perversions of all ordinary action, that the proposals by Mr. Jefferson Davis to issue "letters of marque and *reprisal*" were made before any article of property belonging to the Confederate States, or any one of them, or to any person claiming to be a citizen of any one of those States, had been interfered with; or any person belonging to the Confederate States had been molested by the government of the United States, except in self-defence.\* It is true that the United States in the war of 1812, by the same

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\* April 17, 1861.

act in which they declared the existence of the war, authorized the President to issue letters of marque and reprisal ; but it must be recollected that they complained of long-continued grievances by reason of the seizure of men and property, the confiscation of property, and the denial of reparation. The cases are not only unlike ; they are entirely dissimilar. The Confederate States can hardly claim to make reprisals because of the passage of a tariff long since repealed, even supposing it to have been onerous ; or the passage of personal-liberty laws by some of the States ; or the refusal of Congress to assent that slavery should be admitted into the Territories ; or the election of Mr. Lincoln. None of these things were done to, or suffered by, the Confederate States, which were not then in existence as a belligerent power, or in separation from the United States. In the war of the Revolution, the United Colonies did not attempt to authorize the capture of private property until nearly a year after the commencement of hostilities. Not so the Secessionists. There is no doubt that, from the first, even before any vote of secession, this warfare upon private property was relied upon as one of the means of insuring the success of the insurrection. " If you do not let us secede without any attempt at coercion, we will refuse to pay our debts, and, by means of privateers, ruin your commerce."

From what has been thus stated, we draw a further conclusion that the recent order of Mr. Judah P. Benjamin, acting Secretary of War for the Confederate States, subjecting Colonels Corcoran, Wood, and Lee, Major Revere, and others, who were taken prisoners by the Confederate forces at the battle of Ball's Bluff, to imprisonment in the dungeons of felons, in retaliation or reprisal for the imprisonment of persons taken prisoners on board of the Confederate privateers, some of whom have been tried for piracy under the statute of the United States before cited, is a gross violation of the rules of honorable warfare. The Confederates attempt to escape from the odium of treason by alleging the existence of war. They are bound,



then, to conduct the warfare on their part according to the usages of civilized nations. But there is no usage of nations by which one belligerent, having prisoners who have never been amenable to its laws, and have committed no crime against them, but who have been taken in battle fighting under their own banners, can immure those persons in damp dungeons, and subject them to the treatment of convicts, merely because its belligerent adversary, finding among his prisoners those who according to his laws owe allegiance, and have committed treason, or who in violation of long-existing statutes have incurred the guilt of piracy, proceeds with such persons in the ordinary course of justice according to those laws. If one belligerent merely proceeds according to law, that furnishes no reason why the other should resort to measures sanctioned by no law. The law of reprisals, as it affects persons, — usually termed retaliation, or *lex talionis*, — may rightfully be resorted to in time of war by one nation, when a gross outrage in violation of the laws of war has been committed upon its citizens or subjects by the other, in order to restrain and prevent further outrage. Some of the accredited writers upon public and natural law will, however, hardly sustain even this proposition.

Rutherford expressly denies the right of retaliation by killing prisoners, when the enemy has done the same thing : —

“ The exceptions to this rule of not killing these persons, who never were in arms at all, or who, though they have been in arms, have surrendered themselves, are very few. If they are considered as members of the nation with which we are at war, nothing more is necessary, in the first instance, than to get them into our power. The law of nature, therefore, will not allow us to go further. But if they whom we thus get into our power have been guilty of any previous crime for which they deserve death, this law does not forbid us to inflict this punishment, any more than if they and we were members of no society at all, but were still in the original state of nature.

“ The obstinacy of holding out long in a siege, is not one of these

crimes ; for a discharge of their duty towards their own nation is not in its own nature a crime against the other. There might, perhaps, be some advantage in putting a garrison to the sword for holding out long, as such an example might be a means to deter others from giving the besiegers the same trouble ; but neither this nor any other motive of mere utility will render it just to take away the lives of those who are in our power, and have not deserved to lose them. Neither is retaliation a justifiable cause for killing prisoners of war. Though our adversaries should have killed the prisoners whom they have taken from us, this will not justify us in killing the prisoners whom we have taken from them. The law of nature allows of retaliation only where they who have done harm are made to suffer as much harm as they have done. But to kill such prisoners of war as are in our power, because the nation to which they belong has treated our countrymen in this manner, would be to do harm to one person because harm had been done by another. An injury which is done by a nation does, indeed, communicate itself to all the members of that nation ; and such a communication of guilt is all that can be pleaded for the retaliation of which we have been speaking. But Grotius very truly replies here, that to punish captives or prisoners of war in this manner would be to punish them in what is their own as individuals, whereas the national guilt can only be communicated to them as they are members of the offending nation ; and consequently the proper punishment of it should only be inflicted on them as they are members of the offending nation, and not as they are individuals." — *Institutes of Natural Law*, Book II. Chap. 9, Sect. 15.

"Prisoners of war are, indeed, sometimes killed ; but this is no otherwise justifiable than as it is made necessary, either by themselves, if they make use of force against those who have taken them, or by others, who make use of force in their behalf, and render it impossible to keep them. And as we may collect from the reason of the thing, so it likewise appears, from common opinion, that nothing but the strongest necessity will justify such an act ; for the civilized and thinking part of mankind will hardly be persuaded not to condemn it till they see the absolute necessity of it." — *Ibid.*

Martens admits a more extended rule. Under the head of Reprisals, he says : —

"A sovereign violates his perfect obligations in violating the natural or perfect rights of another. It matters not whether these rights are innate, or whether they have been acquired by express or tacit covenant, or otherwise.

"In case of such violation, the injured sovereign may refuse to fulfil his perfect obligations towards the sovereign by whom he is injured, or towards the subjects of such sovereign. He may also have recourse to more violent means, till he has obliged the offending party to yield him satisfaction, or till he has taken such satisfaction himself, and guarded himself against the like injuries in future.

"There are many acts by which a sovereign refuses to do or to suffer what he is perfectly obliged to do or to suffer, or by which he does what he is ordinarily obliged to omit, in order to obtain satisfaction for a real injury sustained. All these acts are called reprisals. Consequently, reprisals are of many sorts. The *talis*, by which an injury received is returned by an injury exactly equal to it, is one sort of reprisals; but the use of it is not indiscriminately permitted on all occasions." — *Law of Nations*, Book VIII. Chap. 1, Sect. 3.

In a note he adds : —

"If the ambassador or messenger of a state has been put to death by another state, the former state could not, on that account, have a right to put the ambassador or messenger of the latter to death; but in time of war, a prisoner of war may sometimes be put to death in order to punish a nation that has violated the laws of war. In the first case, the injured nation has other means of obtaining satisfaction, and of guarding against such violations for the future; but war being of itself the last state of violence, there often remains no other means of guarding against future violations on the part of the enemy."

So Vattel admits the right to execute prisoners in retaliation for an execution by the hostile general without any just reason, and against an inhuman enemy who frequently commits enormities.

"This leads us to speak of a kind of retaliation sometimes practised in war, under the name of reprisals. If the hostile general has, without any just reason, caused some prisoners to be hanged, we hang an equal number of his people, and of the same rank, — notifying to him

that we will continue thus to retaliate, for the purpose of obliging him to observe the laws of war. It is a dreadful extremity thus to condemn a prisoner to atone, by a miserable death, for his general's crime ; and if we had previously promised to spare the life of that prisoner, we cannot, without injustice, make him the subject of our reprisals. Nevertheless, as a prince or his general has a right to sacrifice his enemies' lives to his own safety and that of his men, it appears, that, if he has to do with an inhuman enemy, who frequently commits such enormities, he is authorized to refuse quarter to some of the prisoners he takes, and to treat them as his people have been treated." — Book III. Chap. 8, Sect. 142.

Chancellor Kent sums up the authorities in these words : —

" Cruelty to prisoners, and barbarous destruction of private property, will provoke the enemy to severe retaliation upon the innocent. Retaliation is said by Rutherford not to be a justifiable cause for putting innocent prisoners or hostages to death ; for no individual is chargeable, by the laws of nations, with the guilt of a personal crime, merely because the community of which he is a member is guilty. He is only responsible as a member of the state, in his property, for reparation in damages for the acts of others ; and it is on this principle that, by the law of nations, private property may be taken and appropriated in war. Retaliation, to be just, ought to be confined to the guilty individuals, who may have committed some enormous violation of public law. On this subject of retaliation, Professor Martens is not so strict. While he admits that the life of an innocent man cannot be taken, unless in extraordinary cases, he declares that cases will sometimes occur, when the established usages of war are violated, and there are no other means, except the influence of retaliation, of restraining the enemy from further excesses. Vattel speaks of retaliation as a sad extremity, and it is frequently threatened without being put in execution, and probably without the intention to do it, and in hopes that fear will operate to restrain the enemy. Instances of resolutions to retaliate on innocent prisoners of war occurred in this country during the Revolutionary war, as well as during the war of 1812 ; but there was no instance in which retaliation beyond the measure of severe confinement took place in respect to prisoners of war." — *Commentaries*, I. 93, 94.

From the more recent work of Wheaton, we quote to the same effect.

"A belligerent has, therefore, no right to take away the lives of those subjects of the enemy whom he can subdue by any other means. Those who are actually in arms, and continue to resist, may be lawfully killed; but the inhabitants of the enemy's country, who are not in arms, or who, being in arms, submit and surrender themselves, may not be slain, because their destruction is not necessary for obtaining the just ends of war. Those ends may be accomplished by making prisoners of those who are taken in arms, or compelling them to give security that they will not bear arms against the victor for a limited period, or during the continuance of the war. The killing of prisoners can only be justifiable in those extreme cases where resistance on their part, or on the part of others who come to their rescue, renders it impossible to keep them. Both reason and general opinion concur in showing, that nothing but the strongest necessity will justify such an act." — *International Law*, Part IV. Chap. 2, Sect. 2.

"The exceptions to these general mitigations of the extreme rights of war, considered as a contest of force, all grow out of the same original principle of natural law, which authorizes us to use against an enemy such a degree of violence, and such only, as may be necessary to secure the objects of hostilities. The same general rule, which determines how far it is lawful to destroy the persons of enemies, will serve as a guide in judging how far it is lawful to ravage or lay waste their country. If this be necessary, in order to accomplish the just ends of war, it may be lawfully done, but not otherwise. Thus, if the progress of an enemy cannot be stopped, nor our own frontier secured, or if the approaches to a town, intended to be attacked, cannot be made without laying waste the intermediate territory, the extreme case may justify a resort to measures not warranted by the ordinary purposes of war. If modern usage has sanctioned any other exceptions, they will be found in the right of reprisals or vindictive retaliation. The whole international code is founded upon reciprocity. The rules it prescribes are observed by one nation, in confidence that they will be so by others. Where, then, the established usages of war are violated by an enemy, and there are no other means of restraining his excesses, retaliation may justly be resorted to by the suffering nation, in order to compel the

enemy to return to the observance of the law which he has violated.”  
— *Ibid.*, Sect. 6.

It is not astonishing, however, that those who violate all principle by the issue of letters of marque and reprisal when no injury has been done to them, and offer a premium of twenty dollars each for the destruction of persons on board any armed vessel of the United States sunk, burnt, or destroyed by a privateer of equal or inferior force, should imprison and threaten to hang other innocent persons, without any trial, merely because their adversary subjects those who accept and act under such commissions to plunder private property, and kill persons on the high seas, to an ordinary trial by jury for alleged offences committed against the laws of the government whose citizens are thus assailed.

But although the insurgents stand legally, as to the United States, in the position of rebels and traitors, and their privateersmen as pirates, and may be so held and treated, it is not a necessary result that the penalty should be exacted, nor that the warfare which exists should be carried on, in all respects, upon the assumption that the only *status* which can be assigned to them is that of rebels. An insurrection may, as we have seen, result in what is properly denominated a war, without losing its character as an insurrection, and without any exemption of those who participate in it from the penalties legally attached to rebellion. Such is the case with all civil wars which originate in an attempt to overthrow the existing government, or seek a separation from it. But in proportion to the magnitude and gravity of the warfare, it gradually loses, in the public mind, its distinctive character as an insurrection, being known as a civil war; and then it is hardly expedient to insist upon the enforcement of the extreme penalties of treason and piracy, against those who are merely subordinate and hireling agencies in wickedness. If such penalties are enforced at all, it should be against the active instigators of, and principals in, the rebellion; but these are the very offenders most likely to escape.

Great Britain, although she imprisoned several of the Colonists in the course of the war for Independence, and treated them thus far as rebels, did not in any case proceed to the extreme measure of execution.

When a rebellion is not immediately suppressed, but assumes the proportions and character of a war on the side of the insurgents, the parties to that war have necessarily, to a certain extent, the political character of belligerents. The government assailed must employ military forces, and place them in conflict with the military force arrayed against it; and the ordinary result of such conflict is the capture of prisoners on both sides. In the first stage of such a conflict, it may be just that the government assailed should treat its prisoners according to their legal *status* as traitors, or pirates, as one of the means of suppressing the insurrection. But when it is apparent that this means fails of its purpose, and becomes an unnecessary severity, the question immediately arises whether the government is not unjust to the persons whom it holds as captives, and who were mere subordinates in the hostilities which have been waged, if it refuse to extend to them the usual treatment of prisoners of war. And the more significant question follows, to wit, whether it is not guilty of still more gross injustice if it leave its own soldiers, who by misfortune have fallen into the hands of the other party, to the hardships of a captivity which it could terminate at any time by an exchange. That government which sends its soldiers into the field with the understanding that, if taken prisoners, they will be left to their fate, without an attempt to redeem them from the hardships and sufferings incident to such captivity, except by the ultimate success of the war, may thereby give them an additional incentive to fight unto death in any hopeless encounter in which they shall happen to be involved; but when it places itself on such a platform, it shows that it has little care for the comfort or safety of those who fight its battles. Certainly, an administration which should long conduct a war

on that principle would not deserve to have battles fought for it.

An exchange of prisoners, while it is thus far a recognition, by implication, of a political *status* of the insurgents as an organized force, implies nothing respecting the legal character of that force. An exchange of prisoners may be made with an independent belligerent nation long established ; it may be made with a belligerent barbarian ; and so it may be made with insurgents, or even with those who are strictly pirates.

It seems clear that, while, on the one hand, the insurgents, by any amount of force which they can muster in the field, in giving to the contest the character of a war, cannot deprive the government assailed of the right to treat them as traitors ; so, on the other hand, government may voluntarily recognize the force arrayed against it as that of a belligerent party, against which it may adopt the modes of warfare usual among nations, as, for instance, a blockade, — or with which it may negotiate for the mitigation of the horrors and sufferings of the warfare, as by an exchange of prisoners, — without thereby depriving itself of the right still to hold the persons engaged in the insurrection as traitors or pirates, according to the nature and character of their hostile acts.

Regarding the Secessionists as mere insurgents and traitors, who by means of the insurrection have for the time subverted the legitimate authority of the United States, and deprived that government of the revenue from customs within the limits of the insurrection, — attempting at the same time to appropriate such revenue to their own use, — the government might, by a mere act or order, have closed the ports, as one of the means of suppressing the insurrection, instead of battering down the towns, which would, perhaps, be somewhat more effectual. There seems to be no reasonable doubt that the President — who, under his power and duty to suppress the insurrection, might order the latter to be done, if in his judg-



ment the exigency required it — might resort to the milder measure of interdicting all commerce there, when it became apparent that such commerce was not, and could not be, carried on with the United States, and, instead of being beneficial, was hostile to them. No blockading force is necessary to the validity of such an act or order. Each nation has a right, for its own reasons, to constitute and to abolish ports of entry ; and one of the reasons for abolishing a port might be the existence of an insurrection there. And so long as other nations recognize the jurisdiction and authority of the government which abolishes, over the *locus in quo*, they must respect the act or order which denies entrance there, although it may be a mere paper regulation, without any military or naval force to support it. If, however, the abolishment of the port was in fact an act of hostility for the purpose of inflicting an injury upon another nation, instead of being designed as a municipal or domestic regulation, it might give just cause of offence.

But an act discontinuing a port of entry, or an order closing such a port and interdicting commerce there, is a very different matter from a blockade of the port. The term “blockade” has its appropriate signification. It means to block up, or shut up, — not to subvert or abolish ; nor does it signify the closing of the port, except by the presence of a force for that purpose. A blockade, properly so called, while it may be used to suppress an insurrection, is not a mere measure for that purpose, without other incidents or consequences attached to it. A blockade proper imports the closing of the port of an enemy by a hostile power, thereby forbidding entrance and exit, under certain rules and limitations, and with certain exceptions ; and it implies at the same time a right in other nations to enter and clear from the port, under the party in actual possession of it, if the blockade is not made effectual by a competent force. It is not the exercise of a mere municipal or domestic right, like that of closing a port by a repealing act, or an affirmative order for the purpose ; but it is a

right of war, acknowledged by the law of nations as existing in favor of one belligerent against the other, and regulated by the rules of international law.

A few extracts from an approved elementary work will be sufficient to show the nature of a blockade.

“ Among the rights of belligerents, there is none more clear and incontrovertible, or more just and necessary in the application, than that which gives rise to the law of blockade. Bynkershoek says, it is founded on the principles of natural reason, as well as on the usage of nations; and Grotius considers the carrying of supplies to a besieged town, or a blockaded port, as an offence exceedingly aggravated and injurious. They both agree that a neutral may be dealt with severely; and Vattel says, he may be treated as an enemy. The law of blockade is, however, so harsh and severe in its operation, that, in order to apply it, the fact of the actual blockade must be established by clear and unequivocal evidence; and the neutral must have had due previous notice of its existence; and the squadron allotted for the purposes of its execution must be competent to cut off all communication with the interdicted place or port; and the neutral must have been guilty of some act of violation, either by going in, or attempting to enter, or by coming out with a cargo laden after the commencement of the blockade. The failure of either of the points requisite to establish the existence of a legal blockade, amounts to an entire defeasance of the measure, even though the notification of the blockade had issued from the authority of the government itself.

“ A blockade must be existing in point of fact; and in order to constitute that existence, there must be a power present to enforce it.”

“ The definition of a blockade given by the convention of the Baltic powers, in 1780, and again in 1801, and by the ordinance of Congress, in 1781, required that there should be actually a number of vessels stationed near enough to the port to make the entry apparently dangerous.”

“ The occasional absence of the blockading squadron, produced by accident, as in the case of a storm, and when the station is resumed with due diligence, does not suspend the blockade, provided the suspension, and the reason of it, be known; and the law considers an attempt

to take an advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud. . . . . But if the blockade be raised by the enemy, or by applying the naval force, or a part of it, though only for a time, to other objects, or by the mere remissness of the cruisers, the commerce of neutrals to the place ought to be free. The presence of a sufficient force is the natural criterion by which the neutral is enabled to ascertain the existence of the blockade."

"The object of a blockade is not merely to prevent the importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded port. The act of egress is as culpable as the act of ingress, if it be done fraudulently. . . . . The modern practice does not require that the place should be invested by land as well as by sea, in order to constitute a legal blockade; and if a place be blockaded by sea only, it is no violation of belligerent rights for the neutral to carry on commerce with it by inland communications.

"It is absolutely necessary that the neutral should have had due notice of the blockade, in order to affect him with the penal consequences of a violation of it. . . . . After the blockade is once established, and due notice received, either actually or constructively, the neutral is not permitted to go to the very station of the blockading force, under pretence of inquiring whether the blockade had terminated, because this would lead to fraudulent attempts to evade it, and would amount in practice to a universal license to attempt to enter, and, on being prevented, to claim the liberty of going elsewhere."

"A neutral cannot be permitted to place himself in the vicinity of a blockaded port, if his situation be so near that he may, with impunity, break the blockade whenever he pleases, and slip in without obstruction. If that were to be permitted, it would be impossible that any blockade could be maintained."

"The fact of clearing out or sailing for a blockaded port is, in itself, innocent, unless it be accompanied with knowledge of the blockade."

"In *Yeaton vs. Fry*, the Supreme Court of the United States coincided essentially with the doctrine of the English prize courts; for they held that sailing from Tobago for Curaçoa, knowing the latter to be blockaded, was a breach of the blockade, and, according to the opinion

of Mr. Justice Story, in the case of the *Nereide*, 'the act of sailing with intent to break a blockade is a sufficient breach to authorize confiscation.' . . . . If the ports be not very wide apart, the act of sailing for the blockaded port may reasonably be deemed evidence of a breach of it, and an overt act of fraud upon the belligerent rights."

"The consequence of a breach of blockade is the confiscation of the ship; and the cargo is always, *prima facie*, implicated in the guilt of the owner or master of the ship. . . . . If a ship has contracted guilt by a breach of blockade, the offence is not discharged until the end of the voyage. The penalty never travels on with the vessel farther than to the end of the return voyage; and if she is taken in any part of that voyage, she is taken *in delicto*." — 1 *Kent's Com.*, 143 — 151.

It appears from all this, that a blockade admits, by implication, that the port is in the possession of a party or power with which the blockading party is at war, and with which neutral nations, if they please, may hold commercial intercourse, subject to the laws of war, without payment of duties to the party instituting the blockade, or interruption by that party except by the blockade, or other warlike operations. In other words, the port is governed for the time being, as between the blockading party and neutral nations, by the law of nations applicable to war between two powers, — instead of being governed, as to them as well as its possessors, by the domestic law applicable to the insurrectionary resistance to the established government. That government cannot say to neutrals, "We debar you from entering this port because it is blockaded, and if you violate the blockade, you will be liable to capture and condemnation," — leaving them to inquire whether the blockade is maintained, and to govern themselves by the law applicable to it, — and at the same time say, "All intercourse with the place is forbidden, because it is our port, but, by reason of insurrectionary force, commerce there cannot be carried on with the United States, and the place, therefore, is no longer to be treated as a port during the continuance of the insurrection."

The right to treat the insurrectionary force as a belligerent power by the institution of a blockade, thus leaving neutral nations at liberty, if they please, to hold commercial intercourse with the insurgents as a belligerent power, so far as they may without a violation of the blockade, is entirely consistent with the position that the insurgents themselves are mere rebels and traitors. In fact, any foreign nation may oblige the government assailed to resort to a blockade in order to prevent commercial intercourse with the insurgents, so far as such nation is concerned, by an acknowledgment of their independence, or, according to modern usage, by a recognition of them as a belligerent power, with a proclamation of neutrality between the contending parties, — which certainly can in no way affect the right of the existing government to deal with the insurgents as traitors, under its own municipal law. And if the government pleases to institute a blockade in anticipation of such compulsion, no implication can arise from it changing the legal relations of the parties. .

Another good reason exists why the government assailed may prefer to give to the insurgent force this character of a belligerent party, so far as its relations with foreign nations are concerned. The laws of blockade, and of capture for violation of it, and the proceedings for adjudication thereupon, are, in general, well settled and defined ; while the rules which must regulate punishment for any violation of an order closing the port, and forbidding entrance into it, as a means of suppressing the insurrection, without a blockade, are not so well settled ; and attempts to deal with infractions of such order by vessels of foreign powers would lead to unnecessary collisions, certainly after a recognition of belligerency.

It has been contended that a nation cannot blockade its own ports ; but this position is not tenable when the port is in possession of a hostile force. To deny the right of blockade in such case would be to deny its right to the port, or, practically, to make it a free port until the government which for-

merly held and still claimed it should destroy it ; for no mere order or act for closing it could be of any avail against a foreign nation which pleased to recognize the insurgents as belligerents, without a blockade superadded.

This leads us to a more extended examination of the relations which foreign nations do or may, according to the rules of international law, sustain to those who, under the plea of Secession, are using the names and styles of several States, and who, with the assumption of State and Confederate authority, are waging insurrectionary warfare against the United States. It is apparent, from what has been said, that these relations might be either one of three different descriptions.

1. In the case of an insurrection, accompanied by an attempt to establish an independent government, a foreign nation may decline in any wise to interfere in the contest, treating the case precisely as if it were an insurrection which in no way affected its interests, except as the actual force of the insurgents interrupts the exercise of authority by the government assailed in places where that government had before exercised it, and still claims the right to continue its exercise. This is substantially the position of Russia, and, in fact, of all European and other foreign powers, as respects the United States, — Great Britain, France, and Spain excepted.

The foreign government which places itself in this relation may, and in some contingencies must, recognize the existence of the insurrection, and vary its action, or that of its citizens and subjects, accordingly. As, for instance, if the United States government should prohibit the entrance of any vessel into a particular port or ports, because the people of the place were in a state of insurrection, so that commerce with the United States under existing treaties could not be carried on there, a government declining any recognition of the insurgents, or interference with reference to the contest, would instruct its subjects, consuls, and officers to regard the prohibition, and comply with the regulation of the existing government, as if that

government still possessed full jurisdiction and control over its bays, harbors, and waters, as before the existence of the insurrection, — without requiring any actual blockade of the ports in order to enforce the prohibition. It may be quite consistent with such a position for the foreign government to claim that all vessels belonging to its subjects, which should enter the ports without notice of the prohibition, should be permitted to dispose of their cargoes and depart with such clearance as could be obtained there, in the same manner as if the prohibition had not existed ; because, acting in good faith toward the government, as if the insurrection did not exist, and leaving that government to contend with it without any interference or recognition of the authority or political existence of the insurgents, the foreign nation might well claim that its subjects should not suffer loss, or be prejudiced, without warning.

A foreign nation occupying such a position comes under no obligation, and owes no duty, to the insurgent power. It may carry on its commerce with the government assailed without any liability, under the law of nations, to search and seizure for contraband goods. It may avail itself of any implied recognition of the insurgents by the government assailed, as by the institution of a blockade, and insist that its subjects have a right to hold commercial intercourse with the insurrectionary power as a belligerent, so far as they may consistently with the blockade. It will naturally refuse to permit its vessels to be overhauled and detained by vessels commissioned by the insurgents as privateers, and may well treat such interference as piratical ; although it will be at its pleasure, and consistent with its position, to permit such visitation as may serve to ascertain the nationality of its vessels, without any search for enemies' property, or articles contraband of war.

Such a position would by no means require the foreign nation, which ignored the insurgent force as an existing power, to treat the privateers commissioned by the insurrectionary government as pirates. It is true, that the British govern-

ment, in the case of Greece, in 1825, alleged that "a power or a community which was at war with another, and which covered the sea with its cruisers, must either be acknowledged as a belligerent, or dealt with as a pirate." But the necessity is certainly not apparent, in respect to any nation whose vessels are not interfered with by such cruisers. With the exception of nations whose commerce is assailed, it is not necessarily an objection to a privateer that she holds a commission from an unrecognized power. Piracy, it is evident, may be of a general, or of a limited character. The slave-trade is piracy under the laws of Great Britain and of the United States. But this does not constitute it piracy as to other nations. And the same may be true of that description of piracy which consists in robbing merchant-vessels on the high seas. The fact, that those who act as privateers under commissions from the Confederate States are pirates by the express provision of the act of Congress before cited, as regards the United States, against whose vessels they direct their warfare, does not constitute them pirates as respects other nations. And the result would be the same, if, by the rules of public law, also, the United States might hold them to be pirates. France, before her recognition of the independence of the United American Colonies, did not treat their privateers as pirates; and the government of the United States has in several instances acted on the principle that privateers of insurgents not acknowledged were not pirates as to the United States, and were not subject to capture as such.\* But if a vessel commissioned as a privateer by an unrecognized belligerent rob a vessel of a neutral nation, may not any nation treat the act as piracy? †

2. Any foreign nation, whenever the circumstances are such as to warrant it, may acknowledge, for itself, the independence

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\* 3 Wheaton's Reports, 610, *United States vs. Palmer*; 7 Wheaton's Rep. 283, *The Santissima Trinidad*; Case of Captain P. P. Voorhies, before a naval court-martial, in 1844.

† 1 Phillimore's *Int. Law*, 398 - 406.



of an insurgent organization, recognizing it as having a national existence, and treating it as a nation ; in which case it may form an alliance with the insurgent government, offensive and defensive, and thus become a party to the war ; or it may, with such acknowledgment, assume a position of neutrality, claiming the rights of a neutral, as between what would then, to the party recognizing the independence of the insurgents, be two equally independent belligerent nations. Such acknowledgment of the independence of an insurgent party, before its independence is recognized by the government which it assails, may or may not furnish just cause of war on the part of that government, according to the circumstances under which it is made. If the acknowledgment follows very soon upon the breaking out of the insurrection, and while the government is pursuing active and energetic measures to suppress it, the aid and encouragement thereby given to the rebels would furnish just cause of offence to the existing government. On the other hand, after the contest has been of long continuance, and the independence of the insurrectionary party has been practically maintained for such a period as to show its capacity to uphold it, then the interests of other nations may well justify them in an acknowledgment of what has been accomplished, — in a recognition of an existing fact, — without just cause of offence to the government which has been resisted, and which has failed to overcome that resistance. The commercial interests of nations having no interest in the contest may require that they should make the recognition, for the purpose of trade, or for other desirable ends ; and the existing government cannot complain of the mere acknowledgment of an actual fact. But such recognition should follow only a practical independence. Such was the case with the acknowledgment of the independence of the South American republics by the United States in 1823, the latter assuming to act as a neutral nation.

The insurgent party, upon such acknowledgment, may

claim the right to send an ambassador or minister to the nation making it, and may expect in due course of time to receive one, and to have their intercourse regulated by treaty. After such an acknowledgment, if the nation making it does not become a party to the war, — either by a treaty of alliance with the party thus recognized, or by a declaration of war by the government assailed, on account of the recognition, — the nation making the acknowledgment is entitled to claim the rights of a neutral with respect to each of the belligerent parties, treating each as a nation, and forming treaties with the insurgent party, as if it were a nation, equally with its adversary; and it may send and receive ambassadors, and trade to and from any ports occupied and held by the party acknowledged, except so far as it is prevented by the exercise of rights accorded by international law to belligerents against neutrals.

The neutral nation has the right to require that its territory shall not be made the theatre of war, nor made use of for the purposes of war, and that hostile enterprises shall not originate in, or be carried on, from it. Its citizens and subjects may be the carriers of the goods of either belligerent, subject to the right of the other belligerent to capture such goods, and to search and detain the neutral vessel for that purpose, but not to confiscate the ship; and they may maintain free commercial intercourse with each belligerent, subject to the rules which forbid aid to the belligerent in the prosecution of the war, and to the right of the belligerent to prevent such intercourse by an efficient blockade.

The duty of the neutral is not to favor one belligerent to the detriment of the other, — not to transport munitions of war, or other goods contraband of war, to either belligerent, — not to carry officers, soldiers, or despatches of either, — to respect any blockade by one belligerent, of the ports of the other, if it is efficient, — and, generally, not to aid either belligerent, in the prosecution of the war, except as the ordinary commercial transactions in goods not contraband incidentally furnish such aid.

The rights of the belligerent as respects the neutral are, to visit and search his merchant-vessels, on the high seas, for the purpose of ascertaining whether enemies' property, or goods contraband of war, or persons whom the neutral may not carry, are on board; to capture the property of the enemy so found;\* and for violation of belligerent rights, by aid rendered to the enemy in transporting goods contraband of war, or persons in the service of the enemy in the prosecution of the war, as officers, soldiers, or other functionaries, or the despatches of the enemy,—and also for violation of blockade,—to capture and confiscate the ship and goods.

These are the principal rights and duties of the parties, as set forth, in substance, by accredited writers on international law, subject in some instances to limitations and modifications, to which we shall refer, so far as they appear to be material to the present discussion.

No nation has as yet acknowledged the independence of the Confederate States. Such acknowledgment is not usually made, unless by a nation which is disposed to ally itself with the insurgents in hostility to the government assailed, until the independence of the insurgents has been acknowledged by that government, or until it has been practically achieved.

3. It is competent for any foreign nation, from the time when an insurrectionary force assumes to institute a form of government, and to carry on a war, to recognize the insurgents as a belligerent party.

Considerations of policy, as well as of comity, may well postpone such a recognition until there has been ample time for the government assailed to assert its power for the suppression of the insurrection. But these are matters of which each nation must judge for itself. Great Britain was the first to make such recognition of the Confederate States. France and Spain have since followed the example.

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\* See Appendix, Note A.

In one sense, this is but the recognition of an existing fact. It seems, however, to carry with it something more than a mere acknowledgment of the fact that there is a state of civil war existing; for that fact may be recognized, spoken of, deplored, and sympathy expressed, as has been done by Russia, without any political consequences attached to such recognition.

The formal recognition of the insurgent party as a belligerent, by another nation, gives the insurgents a political *status* as to the party making the recognition, and involves consequences to the government which is attempting to suppress the insurrection, as has been already suggested. This recognition appears to be an action intermediate as regards the other two, and to be a convenient mode of dealing with a case of intestine war by a foreign nation which is desirous of being civil to the insurgent party, and of availing itself of all the intercourse which can be established with them, without committing itself to an acknowledgment of an independence which may never be achieved, and without the establishment of diplomatic relations, which might be suddenly terminated, and in a manner not greatly to the credit of the neutral, making the acknowledgment of an independence which was proved to be an abortion by the suppression of the rebellion very soon afterward.

As Great Britain was the first to acknowledge the belligerency of the Confederates, and as this acknowledgment is the only one which has affected the relations of the United States in any considerable degree, we shall pursue the residue of our discussion with a more particular reference to the existing relations between Great Britain and the United States. Her acknowledgment did not give the insurgents a right to send an ambassador to the Court of St. James, nor to claim a treaty of amity and commercial relations. It did not place them, as respects her, in the position of a nation. But, being acquiesced in by the United States, it gave her rights as against them which she could not have had, as a neutral nation, but for the recognition; and it also operated to give rights to the

insurgent government as against her, which she would not otherwise have permitted it to enjoy.

Great Britain declared that she was cognizant of the fact that a civil war existed in the United States. That is nothing. All the rest of the civilized world knew the same thing. But by adding the recognition, she accorded to them the warlike rights of a belligerent nation ; and by her superadded declaration of strict neutrality, she allowed to them, for the general purposes of commercial intercourse and warlike operations, all the rights which she allows to the United States, aside from previous treaty stipulations. She bound herself to respect their "stars and bars" equally with the flag of the United States. If, in her existing treaty with the United States, there are any stipulations on her part, the performance of which would conflict with the recognition which she thus made, and the neutrality which she thus assumed, the question might arise, between her and the Confederates, how far she had a right, under the law of nations, to perform those stipulations without a breach of her neutrality. She knew that, at the date of her present treaty with the United States, all the ports in the seceding States, so called, were in the possession of the general government, and that the duties there paid were part of the common funds of the whole United States. She knew that at the time of her recognition those ports were in the possession of the insurgents, who claimed to regulate the commercial intercourse there, and to appropriate the revenues derived therefrom to other uses than to those of the United States. And she knew also how the revenue of the United States would be injuriously affected, by the facilities for smuggling into the Northern States goods introduced through those ports, if a free commerce were carried on there. Yet, by her recognition of the Confederate States as an existing power, she acknowledges those ports to be the ports of the party in possession, and claims the right, as a neutral nation, to enter those ports, and any others which may be opened by

the Confederate States, with her ships and goods, unless the United States government shall enforce its attempts to suppress the insurrection there by an efficient blockade, precisely as she would be authorized to do in the case of two long existing independent nations contending in war, and to which she held the relation of neutrality. The United States are attempting to keep up such a blockade.

It is true that the United States were not compelled to resort to the blockade by reason of her recognition. The intention to blockade was proclaimed on the 19th of April, which was before the recognition. But it is also true, we think, that that recognition, which was in May,\* was in no manner influenced by the implied recognition arising from the blockade. Her recognition of the insurgents as a belligerent party has therefore, to this extent, by her voluntary act, given them the standing of a nation, although there is no acknowledgment of their independence. The blockade itself would not necessarily have done this; and but for the recognition, it might have been terminated at pleasure, so far as Great Britain was concerned, and any other measure of coercion have been substituted.

It has been said, without much consideration, that British ships would have had a right to resort to those ports without

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\* There has been an attempt to controvert the position in the article on "Habeas Corpus and Martial Law" in our last number, that Mr. Chief Justice Taney ought, in Merryman's case, to have taken notice of the existence of the war. The position itself is of very little importance to the argument, — which was to show that the refusal of General Cadwalader to produce his prisoner was sustained by sound principles; for the Chief Justice very plainly intimated that, if General Cadwalader had himself undertaken to suspend the *habeas corpus*, (in other words, to deny his liability to bring in his prisoner,) he would not have taken the trouble to argue the question. But it appears that the Lord Chancellor and other legal authorities in England had found out that war existed here some time before Merryman's case came before the Chief Justice, which was on the 28th day of May. And as the information respecting the facts which served to show its existence was not confined exclusively to that country, perhaps, if Mr. Chief Justice Taney had inquired, he might have found it out also.

any such recognition, if there was not an actual blockade, because, the right of secession being denied by the United States, they are still ports of entry under the laws of the United States, the President having no power to repeal the laws constituting them ports of entry. It is readily conceded that the President has no power to repeal a law ; but we have already suggested that he might, by reason of the insurrection, which prevented the collection of the duties, and for the purpose of suppressing that insurrection, close the ports by a proclamation, which all foreign nations that did not recognize the belligerent *status* of the Confederate States would be bound to respect. If there was in fact a doubt respecting his constitutional power, the intercourse of foreign nations with the United States is through the Executive, and they are not authorized to go behind his acts, and to allege that they are nugatory, because under the provisions of the Constitution a power which he attempts to exercise is vested only in Congress.\* There is no need, however, of saying this in a curt or spicy manner.

Moreover, without regard to any question of right legally to close the ports, foreign nations could not claim to enter those ports, as ports of the United States, after they had been notified by the Executive that they could not make their entries there under the authority of the United States, — that duties paid there would be paid to insurgents, — and that clearances there must be taken from parties at war with the United States ; for which reason, and for the suppression of the insurrection, entries were forbidden.

But the burden of the recognition seems not to be altogether upon the United States. Great Britain appears there-

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\* Mr. Jefferson Davis understands this. In his first message to the Confederate Congress, he said that the proclamation of President Lincoln was a plain declaration of war, which he was not at liberty to disregard, because of his knowledge that, under the Constitution, the President was usurping a power granted exclusively to Congress. "He is the sole organ of communication between that country and foreign powers."

by to have subjected her merchant-vessels not only to a right of visit to ascertain their nationality, but to a right of search and capture, in the same manner, and to the same extent, as she would have done had she acknowledged their independence. If the United States must accord to her the rights of a neutral nation, by an efficient blockade, in order to exclude her vessels from the Southern ports, they must certainly have the rights of a belligerent against a neutral, and may capture, in her merchant-ships, goods the property of the enemy, all articles known as contraband of war, and all persons whose carriage by the neutral is not in strict accordance with the neutrality.

The privateers commissioned by Mr. Jefferson Davis may, in like manner, search British merchant-vessels with similar rights, and for any abuse of the power her reclamation for damages is upon "King Cotton," if he is not in the mean time consumed by his own or some other fires.

Whether the Confederate privateers will also be authorized to capture such loyal citizens of the States which have seceded as may be found on board of British vessels,—but having no military or hostile character except as they are citizens of the United States,—and turn them over to the Confederate government as prisoners at twenty-five dollars per head, according to the tenor of the law under which they are commissioned, is perhaps not so clear. Upon the principle, or want of principle, of what the London Times now calls the "antiquated law," by which Great Britain claimed a right to search, and take her subjects from, the vessels of the United States, she would be bound to admit the right of the United States to take their citizens from her vessels; and giving equal rights to the Confederate States, the question would arise whether all citizens of the seceded States are included within the rule. This assumption of burdens, however, is her affair, not ours. We merely advert to it as one of the incidents which attends the recognition.



It seems very apparent, from what we have stated, that the recognition of the Confederate States as a belligerent power has substantially the effect of an acknowledgment of their independence, except that it does not authorize a demand of diplomatic intercourse and the formation of treaties. How far was such an early recognition justified by history?

The long civil war of her South American Colonies against Spain, and their establishment of independent governments *de facto*, required a recognition of them by the United States. Lord John Russell referred to the recognition of Greece, in her war against Turkey, as furnishing a precedent. We are not advised that he referred to any other. But the precedent fails entirely, except as to the fact of that kind of recognition. Greece had no share nor voice in the government of herself, still less in governing Turkey at the same time. She had not furnished three quarters of the Sultans who within less than a century had occupied the throne at Constantinople, and she had not, by one enginery or another, shaped the legislation of the great divan of the Turkish empire so as to suit her purposes, in three quarters of the political measures adopted there during the same time. No state had been annexed to the empire for her aggrandizement, and to give her political strength; and no war had been waged for the acquisition of Mexican or other territory in order that she might diffuse through it her peculiar institutions. On the contrary, she had been subjugated, though not entirely conquered; subdued, with the exception of the almost wild inhabitants of her mountain fastnesses; and ground into the dust by the iron heel of a military oppression which spared neither age nor sex, — which wrested from labor the reward of its toil, and snatched from hunger the morsel necessary to save it from becoming starvation.

This people rose up in their might against their oppressors, in 1821, reasserting their national existence; and after a warfare of more than four years, — a warfare of immeasurable atrocity

on the part of the Turks, and almost corresponding ferocity on the part of the Greeks,—a warfare which placed Missolonghi and Navarino on the page of history by the side of Marathon, and immortalized, among many others, the names of Mavrocordato, Colettis, Kanaris, Botzaris, and Miaulis,—the British government issued “a decided declaration of neutrality” between the belligerents.

The conclusion seems to follow, that the acknowledgment of a belligerent *status* of the Confederation, before the administration of President Lincoln had had time to determine upon its measures and organize its forces for the suppression of the insurrection,—with the attempt to carry on a neutral commerce with the ports within its limits, which ports are *de jure* still within the United States and under the jurisdiction of that government, and were only *de facto* without their jurisdiction, by the force of an insurrection of from four to six months' duration,—is entirely without a precedent, and might well be deemed a grave ground of offence to the United States, had not the blockade been previously instituted. It has undoubtedly been the cause of deep feeling among the people. We are aware that Dr. Phillimore says: “There is no proposition of law upon which there exists a more universal agreement of all jurists than upon this; viz. that this virtual and *de facto* recognition of a new state gives no just cause of offence to the old state, inasmuch as it decides nothing concerning the asserted rights of the latter. For if they be eventually sustained and made triumphant, they cannot be questioned by the third power, which, pending the conflict, has virtually recognized the revolted state.”\* But he is speaking of such recognitions as were made by Great Britain of the South American Colonies, after a struggle between them and Spain of about twelve years; and he refers to President Monroe's message of December, 1823, and to the speeches of Mr. Canning and Sir

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\* 2 Phill. on International Law, 18.

James Mackintosh upon that subject, as his authorities for the proposition.

A recognition following soon after the breaking out of an insurrection, and where from the peculiar circumstances there are special difficulties in organizing the forces of the government for the suppression of it, has the effect of giving an encouragement to it, which a nation in amity with the existing government, and desirous of continuing that relation, is not authorized to give.

The British government were as little prepared for the breaking out of the insurrection in India as the United States were for that of the South; but the arm of the government was not paralyzed, for the time, by a complicity of Cabinet officers with the insurrection, and by such a state of inaction, if not complicity, on the part of the head of the administration, that nothing effective could be accomplished to arrest it until the traitors of the Cabinet had been forced to send in their unwilling resignations. Besides, the available military force of the British near the scene of warlike operations was much more readily concentrated, and comparatively of much greater efficiency, than that of the United States; and (excepting native troops) it had few or no traitors in it. Still, with all these advantages, the British power in India was for a considerable period shaken to its foundation, and it was said in high quarters that "India was to be reconquered." Now suppose that, at about the time when Havelock began to move effectively for the suppression of the rebellion, some member of Congress had arisen in his place, and proposed a formal acknowledgment of the independence of British India. That would have been but the act of an individual legislator, who, not being the authorized exponent of the views of the administration, could in no wise compromise the government itself. But suppose the authorized Cabinet officials had thereupon, if not in hot haste, yet under no circumstances of necessity, proceeded to declare that the United States had concluded to recognize the king of

Delhi and his adherents as belligerents. The English government would undoubtedly have regarded this as an evidence of hostility, not entirely rebutted by any proclamation of strict neutrality which might have accompanied it. Yet such a proceeding would not have given courage and confidence to his Majesty of Delhi and his confederates to persevere in their rebellion.

Such are some of the relations of the United States, domestic and foreign, arising from the insurrection in the Southern States, as they exist at the present time. What are the reasonable speculations for the future on this subject?

The Confederate War Secretary, upon the occasion of the bombardment of Fort Sumter, prophesied that the Confederate flag would float over the dome of the old Capitol before the first of May; and he added: "Let them try Southern chivalry, and test the extent of Southern resources, and it might float eventually over Faneuil Hall itself." Well, Southern chivalry has been tried. It began by stealing all the public property it could lay its hands on, and then issuing letters of marque and reprisal before a particle of property had been taken by the United States, or any injury had been done to the Confederacy which could by any possible construction warrant *reprisals*. It has proceeded by the confiscation of the property of those who, having faith in the securities of Southern States and Southern people, had invested in such State securities, or given credit to traders for merchandise; and this without regard to any act done by such holders of stocks or creditors, but merely because certain people of the Southern States chose to rebel against the government of the United States, that government resisted the attempt, and the stockholders and creditors were, ever had been, and still remained citizens of the United States. Chivalry finds its only justification for this seizure of private property in the fact, that the government under which all the parties have heretofore lived, and to which all acknowledged a common allegiance, resists

the efforts of the debtors to accomplish a revolution. Chivalry has been tested in arms, as well as in legislation, and it manifests itself in masked batteries and ambuscades, the hoisting of false flags and signals, and all manner of false pretences for the purpose of securing an unequal advantage. Chivalry thus far is cooped up within the limits of the States seceding, except that, in violation of all its State-rights theory, it is insisting that Missouri and Kentucky, against the expressed will of the people of those States, shall join in the rebellion ; and it has thereupon attempted to overrun the former, and has made a lodgement in the southern portion of the latter. As an offset to this, it has lost Western Virginia, considerable portions of the eastern part of that State, and several positions on the seaboard in other States. It stands now, and, so far as at present can be judged, it is likely to stand, very much on the defensive, unless Southern "resources" come to the rescue.

Thus far Southern resources have not shown to much better advantage than Southern chivalry. Proposals for a loan of fifteen millions of dollars are said to have realized ten millions. A project for a loan of cotton to the amount of one hundred millions is admitted to be a failure, because the "king" is shut up on a barren throne within his dominions, and cannot there be made negotiable. A tax of fifteen millions remains to be collected in such manner as it may be. In the mean time an issue of one hundred millions of Confederate bonds has no convertibility into coin, and no basis of redemption, and can therefore have no credit outside the limits of the Confederacy, and none within it except such as is enforced by the necessities of the war. Banks have suspended specie payments, and coin of all descriptions is at an extravagant premium. External trade is nearly all cut off by means of the blockade, a few arrivals and clearances, through a surreptitious evasion of it, furnishing only an exceedingly limited supply of munitions of war and foreign goods. Of

manufacturing and domestic trade there can, under these circumstances, be but a very small amount, except in connection with supplies for the army; and many descriptions of what are ordinarily regarded as the necessities of life are, in particular districts, at almost famine prices. On the other hand, the agricultural crops for the present year are supposed to have been abundant, so that there is no prospect of the termination of the war by absolute starvation.

In discussing the question of the probable duration of the war, it has been suggested that the people of the South are fighting, or, what is the same thing, believe they are fighting, for their liberties; and that, in all controversies of such a character, there is a pertinacity of purpose, which continues the contest without resources, and under all deprivations and reverses, until a final victory is achieved. One of the resources of the leaders of the rebellion has been the representation to the great mass of their misguided followers, that this is a war of subjugation, and that, if they fail to fight to the last extremity, their liberties will be lost. But the sober second-thought, if that thought ever comes, will show them that the termination of the war will leave the several States which have attempted to secede in the possession of all their rights of sovereignty, and in all the control of their municipal affairs which they have ever had since the adoption of the Constitution,—except so far as the rebellion has introduced revolution into any particular State, through which some of them may possibly find themselves dismembered by the action of their own people,—and except as the situation and legal condition of their slaves may, to a very material extent, be changed, if the war is protracted.

That the war must continue on the part of the North until the navigation of the Mississippi, from its sources to its mouth, is secured to the people of the Northwest, so that no hostile power upon its banks can impede such navigation, or until the Northern States are rendered powerless to prosecute the

contest to a successful issue, may be assumed to be certain. The promptitude with which batteries were erected on the banks of that river immediately after the outburst of the secession, for the purpose of controlling and closing the navigation of it, and thereby coercing the people of the Northwestern States into submission to the rebel power, shows conclusively that there can be no security for the free navigation of it except by holding it, and its banks on either side, within the jurisdiction of the United States. The great facilities for smuggling, through the entry of goods into the Southern ports and their subsequent introduction into the North along such an extensive line of inland frontier as would exist on a separation of the States,—and the fact that rival interests would create sources of constant irritation,—furnish other reasons why the eventual establishment of the authority of the United States must be sought by the Northern States, even through a protracted contest, and at an enormous sacrifice. With victory secured, the North would rise up with renewed energy, and with its own material interests comparatively unimpaired, except by a decrease in the demand for articles heretofore furnished to the South.

Not so with the South. With a protracted contest, even victory is a substantial defeat. Cotton, which has been supposed to be the great resource to carry them through the revolution, has, as we have seen, thus far proved a failure. It cannot be applied as a means to carry on the war to any great extent, except by a conversion into money or other articles; and as this could not be effected, the crop of the present year remains on hand. Only a certain amount of cotton, more or less, is required for the consumption of the world, and this crop, if it could have found a market, would have supplied the demand in England, France, and the Northern States. With the diminished demand for manufactured articles, the supply from other quarters has thus far sufficed, so that no great distress has supervened from the want of Southern cot-

ton ; not more, probably, than ordinarily occurs in the course of a commercial revulsion, perhaps not so much. Another full crop, if raised before this is disposed of, will operate as a reduction of its ordinary value, by furnishing an excess of supply for the existing machinery. In the mean time, every year's delay in getting it to market stimulates the cultivation of cotton abroad. If the present state of things continues two or three years, the competition of foreign cotton will reduce the price to perhaps two thirds, or even one half, of the rate heretofore paid ; and with this reduction comes a corresponding reduction in the value of slaves and the value of plantations. It is for the interest of Great Britain to foster and protect the growth of cotton in her own dominions, and the production of a sufficient amount within her territory once secured, American cotton will not be allowed to ruin that source of national wealth.

Another resource of the South, which has thus far been the means of strength in the prosecution of the war, is slavery. The slaves are the producers, and the masters can all the better be spared to fill the ranks of the army. It will continue to be so until the troops of the United States penetrate the slave territory. Until that time, proclamations for emancipation, from whatever source, will be of no avail. The President and Congress have no more authority to emancipate the slaves, than the writer of this article. An attempt so to do would be a gross usurpation of power. The general at the head of the army has no right to emancipate them, except as an incident to military occupations and operations ; and whatever theory may exist on that subject, he can accomplish nothing further than he penetrates the country. So far as he does this, the question of his right to issue a proclamation for that purpose is not very material. The emancipation will take care for itself. He cannot fight the rebels successfully, and at the same time aid them to hold their slaves ; and the result is practical freedom. If they avail themselves of it, be-



cause their masters have escaped from them, then there is no fugitive slave law to return them after the rebellion is suppressed. But if they remain until their masters have resumed their occupation under State authority on the return of peace, this practical freedom is not likely to prevent their return to bondage. When, however, the Northern army has made a successful march through Virginia into South Carolina, there is another result, which, while it cannot be contemplated but with horror, must, if it occur, be charged to those whose madness will have brought it upon them.

The great resource upon which the South has relied to carry it successfully through a revolution, has been the interference of Great Britain and France. It was assumed that cotton was a king at whose feet the people of Europe must prostrate themselves and their principles, and that, if Southern chivalry could not fight its own battles, they would, through this instrumentality, be fought for it by other powers. It remains to be seen whether this resource will be made available to the accomplishment of the object. What is the probability of such interference?

Without assuming the office of a prophet, we venture to express a confident belief that there will be no immediate change in the relations which at present exist between the United States and foreign powers, unless some new, and at present improbable, complication of those relations shall give rise to new and grave causes of hostility.

The sympathy of Russia with the United States has been manifested in a most friendly and generous manner.

Spain, not only in her proclamation of neutrality, but in the enforcement of it by the release of the prizes sent into Cienfuegos by the privateer Sumter, has given conclusive evidence that she has no sympathy with the rebellion.

With respect to France, there has been no supposition that there was danger of collision. The course thus far pursued by Napoleon III., and by the people of the French empire, while

it has evinced a deep solicitude respecting the effect which the civil war might have upon the material interests of France, has at the same time furnished satisfactory evidence that the French government and the French people — with some exceptions certainly among their press and people — are disposed to accord to the United States all their rights, upon the most fair interpretation of the law of nations.

What is the probability that Great Britain will belie all her professions in favor of free principles, and tarnish her fair fame by an alliance with a rebellion, which, caused almost entirely by the opposition of the North to the extension of slavery, has organized a Confederacy with slavery for its chief corner-stone, and which, if successful in establishing its independence, will soon insist upon opening the slave-trade ?

There are certainly no grave causes of controversy or hostility between the United States and Great Britain. More than two generations of mankind have passed away since the period of the American Revolution, and very few remain within the confines of this world whose fading memories retain even a faint remembrance of that contest. The controversies which led to the war of 1812 have either been amicably settled, or have fallen out of sight, and there can be no rankling bitterness which arose out of them still remaining to find expression in the promotion of another war. Most of those who, on either side, were actively engaged in that contest, have laid their hostility to rest in the bosom of their common mother, — earth. That all causes of difference arising from two wars, and from divers controversies respecting boundaries, and other matters of dispute, had left no evil feeling on the part of the people of the United States, or at least the Northern and Western portion of them, was made most clearly apparent upon the occasion of the visit of the Prince of Wales to this country in 1860. There could not possibly be a more exuberant manifestation of perfect friendship than was exhibited, not only by all persons in official station, but by the great masses

of the people, of all classes and conditions, from the time when the heir apparent set his foot upon the soil of Michigan, until the moment when it left its last imprint upon that of Maine on his departure homeward. If there was any one who was weak enough to suppose that the grand pageant, which continued almost without interruption from day to day during his progress through the country, — in which President and Cabinet, governors and judges, senators and representatives, vied with one another in proffers of respect and courtesy, and in which the great body of the people made the welkin ring with their shouts of welcome, — was a mere demonstration of joy at the sight of a live prince, or a weak cringing to royalty, he must have greatly misunderstood the signs of the times. The enthusiasm, which seemed almost unbounded, while it was undoubtedly a spontaneous testimonial of respect to the Queen, showing the popular estimation of her Majesty as a sovereign, a woman, a wife, and a mother, was at the same time a demonstration of gushing good feeling for the government of the country and its people at large. Old causes of feud were forgotten, — rival industrial interests were for the time but as matters for a generous competition, — taunting words, which in bygone days had been profusely dispensed, gave place to courteous speech, which not only came trippingly from the tongue, but which welled up from the heart.

There was certainly no little cause for astonishment, and there might well be no little revulsion of feeling, on the part of the people of the Northern States, when, within some six months afterward, and before the incoming administration had time to make preparations for suppressing the insurrection, there was an effort in Parliament to give strength to it, by an acknowledgment of the independence of the Confederacy, and the establishment of commercial relations with it, which found large countenance from the English press.

It may be admitted — it is undoubtedly true — that much of this offensive demonstration had its origin, not in feelings

of hostility, but in a belief that the rebellion must succeed, and in anticipated commercial relations with the new-born power thus proposed to be baptized into the great national and commercial church universal; which was — even upon the supposition of its existence — the offspring of treason and fraud, lying in a cradle constructed by theft and robbery, and rocked and nursed by African slavery. But it appeared somewhat remarkable that the wise politicians who were thus willing to overlook the stigma upon the parentage of the bantling for which they were ready to stand as political godfathers, should at the same time have ignored the fact that the commercial intercourse of the Northern States was of some value to Great Britain, and that this was likely to be seriously interrupted at no distant day, if their project was accomplished. It may be, however, that they supposed, with the London Economist, that the dismemberment of the Union would paralyze both sections. The Economist, while disclaiming any feeling of hostility, very frankly admitted its joy at the prospect of the dismemberment, not merely on account of the commercial advantages to accrue to England, but because it would destroy the power of the people of the United States, and put an end to their vain boasting. As for the “boasting,” it is quite true that in speeches in Congress, in inflammatory editorials, in fourth of July orations, lyceum lectures, and sometimes in things called sermons, we exhibit enough, and more than enough, of that miserable spirit; no small portion of it being (if regarded at all) offensive to England and Englishmen, although it is specially designed for home consumption. But there are at least two things to be considered in extenuation. We know what people, of all the world, have heretofore set us the example in this respect; and we know also from what people in bygone and later days have come the taunts and the disparagement which have given rise to no small portion of it. But when we gave the Prince of Wales his great ovation, we were not thinking of the old

inquiry, "Who reads an American book?" nor of the characteristics which have more recently, over the water, been assigned to "our American cousins" and their democratic government. Whatever may have been said by politicians in Congress or out of Congress, or by newspaper correspondents or editors, or in great and small orations, furnishes no good reason why Great Britain should interfere on the Confederate side, in this civil war. A full share of this offensive boasting has had its location south of Mason and Dixon's line.

It was for a long time expected by the Southern leaders that Great Britain would raise the blockade to procure a supply of cotton, and great efforts were made to represent that it was not efficient. We had been at some pains to procure statistics on which to base a trustworthy estimate of the supply of cotton which will be received in Great Britain in 1862 from other sources than the Southern States, for the purpose of showing that her necessities in this respect would furnish no excuse for any such interference. No evil, such as ordinarily attends a commercial crisis, could furnish a sufficient reason. But we are relieved from a discussion of this subject by the *London Economist*, which — referring to the notion of the Southern political leaders, "that by starving France and England, by the loss and suffering anticipated as the consequences of an entire privation of the American cotton supply, they will compel those governments to interfere on their behalf, and force the United States to abandon the blockade" — says: —

"If they really expect such a high-handed violation of all international usage on our part, we can only say their leaders are less sensible and experienced men than we have hitherto supposed. There is not the remotest chance that either power would feel justified for a moment in projecting such an act of decided and unwarrantable hostility against the United States. We are less dependent upon the South than the South is upon us, as they will ere long begin to discover. It is more necessary for them to sell, than for us to buy. As we have

more than once shown, the worst that can happen to us from a continuance of the blockade will be, that our mills will have to work two-thirds time; and it is by no means sure from present appearances whether the aggregate demand of the world would suffice to take off much more than three fourths of a full production, even if we had cotton in abundance."

The allegation that the blockade has not been so far effective as to comply with the rules of international law on that subject, if it may have been true at some places, has not been so to the extent which has been represented. The blockading force has in most instances been sufficient to make any open attempt to enter or leave the port dangerous. The number of arrivals and departures, which has been paraded as evidence of its inefficiency, furnishes no proof against it. Nearly all of them have been fraudulent evasions of the blockade.

It is not incumbent on the party instituting a blockade to station a force at all the inlets and petty harbors on the coast, where there is no recognized port; where no entry could be made, or clearance had, in time of peace; and where, of course, if any commerce were carried on, it would be smuggling, and not a lawful commerce. Any running into and out of such places, in order to avoid the danger of the blockading force, is fraudulent, and has no tendency to show that the blockade is not effective.

Nor is it necessary that the blockading force should be such that a vessel, taking advantage of a skilful pilot and the darkness of midnight, cannot make her entry, or exit, without being discovered. To require such a blockade would be to require an impracticability. Vessels navigated by steam, to say nothing of sailing-vessels, by selecting their time, can in many instances run a blockade.

Whether the contrivances to evade the blockade are by the petty codfish hucksters of the Anglo-American colonies, who fraudulently clear for some of the West India Islands, and then slyly slip into Hatteras or some other inlet; or whether

by the more pretentious "greedy merchants" of Hartlepool or some other "pool" on the English coast, "who care not how things go, provided they can but satisfy their thirst of gain,"\* and who, violating at the same time the laws of their own government and those of the United States, the vaunted principles of British freedom and the proprieties of national intercommunication, sneak, in the darkness of night, into the harbor of Savannah or of Charleston, for the sake of acquiring the "almighty dollar" with the love of which they delight to taunt the Yankees;—it does not rest with Great Britain to allege that the success of such attempts, however numerous, by those whom she must admit to be, thus far, her unworthy subjects, can show an insufficiency of the blockade.

Almost at the time when we were writing the last sentence, the foreign relations of the United States were further complicated by the seizure of Messrs. Mason and Slidell, on board the British steamer *Trent*, on her passage from Havana to St. Thomas, she being at the time on the high seas, and being (it is understood) a passenger vessel, owned by private parties, but carrying the British and foreign mails by contract with the government.

Messrs. Mason and Slidell had recently left the port of Charleston, in a vessel belonging to parties there, for the purpose of proceeding to Europe, by way of Havana, as "Ambassadors of the Confederate States," as they have generally been called; but a more correct designation would be, as the agents or commissioners of the Confederate government, for the purpose, it may be presumed from other facts too numerous here to be stated, of obtaining, if possible, an acknowledgment of the independence of the Confederate States,—of communicating with their agents already there,—and of aiding in the adoption of such measures as might promote the interests of those States in the existing war with the United States, by ne-

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\* Puffendorff, cited by Sir William Scott, 1 Rob. Adm. Rep. 352.

gotiations for the purchase of arms and munitions of war, and their transportation to the ports of the Southern States.

Mr. Jefferson Davis, in his late message to the Confederate Congress, speaks of them as "the distinguished gentlemen whom, with your approval, at the last session, I commissioned to represent the Confederacy at certain foreign courts"; and he charges the United States with having "violated the rights of embassy, for the most part held sacred even among barbarians, by seizing our ministers whilst under the protection and within the dominions of a neutral nation." It may be noted that this shows conclusively that their original destination was Europe,—that their proceeding to Havana in the first instance was merely for security, or convenience, and transshipment,—and thus that their voyage on board the Trent was merely a continuation of a voyage from Charleston to Europe. They were bearers of despatches, also, of the character of which we shall speak hereafter.

From this designation of them as "Ministers" and "Ambassadors," in the message, and elsewhere, it was but a matter of course that much of the discussion, in the papers of the day, has been upon the question of the right of a belligerent to stop the *ambassador* of his enemy. The right is asserted by Vattel. It is reasserted by Sir William Scott, in this language:—

"I have before said, that persons discharging the functions of ambassadors are, in a peculiar manner, objects of the protection and favor of the law of nations. The limits that are assigned to the operations of war against *them*, by Vattel, and other writers upon those subjects, are, that you may exercise your right of *war against them*, wherever the character of hostility exists. *You may stop the ambassador of your enemy on his passage*; but when he has arrived, and has taken upon himself the functions of his office, and has been admitted in his representative character, he becomes a sort of *middle-man*, entitled to peculiar *privileges*, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are in some degree interested."—*Case of the Caroline*, 6 Robinson's Adm. Rep. 467, 468.



The doctrine thus stated may, as between England and the United States, be regarded as a sound principle of international law.

“You may stop the ambassador of your enemy on his passage”? When, and where, and on what passage, may you stop him? It has been argued, in reference to this case, in substance, that he may be stopped only while in his own country, or while passing through the country with which his government is at war, or on the high seas in a vessel of his own country; and that in this case the stoppage was unlawful, because the ambassador when in a neutral vessel is in a neutral territory. Mr. Jefferson Davis falls into this error. He speaks, as appears in the extract above quoted, of seizing “our ministers while under the protection and within the dominions of a neutral nation”; and he adds, that “a claim to seize them in the streets of London would have been as well founded as that to apprehend them where they were taken,” which shows that he has no very correct notions upon the subject. It is readily perceived that no possible question could arise respecting the right to stop the ambassador of your enemy, as you may stop any other enemy, when you find him in the enemy’s territory; or if he attempt to pass through your own, on his way to his destination. There is as little doubt that you may not interfere with him while in neutral territory, without just cause of offence to the neutral power whose territory protects him; and no question whatever that a neutral vessel on the high seas is, as respects belligerent rights, in no just sense neutral territory. The right in time of war to search a neutral vessel which may reasonably be supposed to have contraband goods on board, and to capture and confiscate the vessel, as well as the goods, shows conclusively a marked distinction between the vessel and the territory of the neutral, the latter not being the subject of search, and of course not of seizure and of confiscation, on the ground that munitions of war are found there, — even with evidence that they were intended to be conveyed

to the enemy. The question of contraband, or not, does not arise until the goods are on their transit, and out of the local neutral jurisdiction. If then, as a matter of international law, you may stop the ambassador of the enemy, you may stop him on his outward passage while on board a neutral vessel.

But the further question immediately presents itself, May you stop him in all cases where you find him thus in the neutral vessel, and if not, upon what voyage must he be found in order to the exercise of this right? Vattel and the text-writers, in laying down the proposition, could not have contemplated merely the case of a stoppage on a voyage from one port of the enemy to another port belonging to him, because the passage of an ambassador is not ordinarily of that character. Sir William Scott evidently did not so apply it, because he was not speaking with even the most remote reference to any such case. He added, as we have seen, "But when he has arrived, and has taken upon himself the functions of his office"; showing that the "passage" he had in contemplation was a passage to the place where he was to exercise those functions. This shows also that the principle is not applicable merely to an ambassador returning in a neutral vessel to his own country after his functions have ceased; nor to the case of an ambassador who, after his reception at the neutral court, is proceeding to another neutral port, for a temporary purpose, on private business,—for that is the very case of all others, if there be one, in which you cannot stop him, because his character of ambassador may be held to continue, and protect him, as if he were still in the neutral country to which he is accredited.

The conclusion would seem to be, that he may be stopped in a neutral vessel, on the high seas, on his way to the country to which he is sent, before his arrival and reception, and before, therefore, he is entitled to the protection of the neutral nation to which he is accredited. And if he may be stopped when proceeding directly from his own port in a neutral ves-

sel, it is not material, so far as the right to stop is concerned, that he has touched at an intermediate port, for the purpose of greater supposed security, and for transshipment. His character of hostility exists as much in the one case as in the other, and it is only when he has arrived in the country in which he is to exercise his office, that this character of hostility ceases, and that of a "*middle-man*," entitled to peculiar privileges, attaches to him, and the neutral territory protects him. But if he is received on board at a neutral port, with no circumstances to excite suspicion that any character of hostility attaches to him, that may well affect the question whether the vessel is liable to confiscation.

It is true that the case of the *Caroline* was one in which the question related to the carriage of despatches from the Minister and Consul of France in the United States to the government of France ; and it has been objected that the remarks of Sir William Scott on this subject were therefore mere *obiter dicta*, that is, the expression of his opinion. But he was led by the case to consider this very subject, and it is evident from the context and the citation from Vattel, that it was a well-considered opinion. So the text-writers, so far as they speak of the principle, have received it ; for they have promulgated the rule, as thus stated, without doubt or question. At least, we have not seen or heard of anything to the contrary.

We are aware that in the same case Sir William Scott, speaking of despatches, says : —

“ The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake in any degree of the nature of hostility against you. The enemy may have his hostile projects to be attempted with the neutral state ; but your reliance is on the integrity of that neutral state, that it will not favor nor participate in such designs, but, as far as its own councils and actions are concerned, will oppose them. And if there should be private reason to suppose that this confidence in the good faith of the neutral state has a doubtful foundation,

that is matter for the caution of the government, to be counteracted by just measures of preventive policy, but it is no ground on which this court can pronounce that the neutral carrier has violated his duty by bearing despatches, which, as far as he can know, may be presumed to be of an innocent nature, and in the maintenance of a pacific connection."

But these remarks will not apply to an ambassador for the first time on his passage. If he is proceeding, in time of war, upon an embassy to another nation, even a neutral nation, he goes as a high official, to support the interest of his country there in relation to the war, as well as other matters, and his character is necessarily that of hostility. When he arrives, the neutral territory will protect him; and then perhaps it is not to be presumed that his communications *to the neutral government* are those of hostility, and that you are to place reliance upon the integrity of that government.

We have stated this matter thus at large to show that, on the express statement of the official organ of the Confederate government, these persons were not mere peaceful passengers on their private business, as they seem inclined to represent themselves in their "protest"; and that, if they had possessed the official character which their commissions assumed to confer upon them, they would have been liable to capture.

But these persons were not ambassadors;—no question respecting the rights of an ambassador, or the protection of an ambassador, is brought directly in question by the seizure;—and the case of the United States is all the stronger because they were not entitled to that character.

The right to send an ambassador, and of course to confer the privileges of an ambassador so far as the party sending has the power so to do, is a national right, and not a belligerent right. And as neither the British government, nor any other government, had acknowledged the nationality of the Confederate States, the latter were not authorized to commission an ambassador.

Messrs. Mason and Slidell were public agents of the Confed-

erate States of high official standing, — commissioners, bearers of despatches to other agents of those States already abroad, and charged with other errands of hostility to the United States, — designated as ambassadors, but possessing neither the character nor the privileges of that office. The general question then comes, May such hostile agents of the enemy — proceeding from the enemy's country in an enemy's vessel, but, for the purpose of avoiding capture, stopping in the territory of one neutral, and there transferring themselves to the vessel of another neutral — be stopped and captured while they, with their despatches, are on board the latter vessel, not having arrived at any territory occupied by that neutral? This is the first general question.

It may be admitted that there is no precedent which precisely covers all the facts of this case; and we are therefore put upon the inquiry, What is the true principle applicable to this new state of facts, and by which the question is to be solved?

Asking our readers to bear in mind what we have already stated in regard to the rights, duties, and obligations of neutrals, we proceed to further citations from the opinions and judgments of Sir William Scott, expressed and rendered in 1807, which were not only binding decisions at the time, determining the disposition of very large amounts of property, and then received as sound expositions of law by the British crown and people, but which have since been generally regarded as authority by the best elementary writers in England and in this country.\* So far as we are aware, they commanded the entire confidence of British statesmen and lawyers, until within perhaps the last thirty days. The estimation in which Sir William Scott was held by the British government appears from the fact, that he was afterward raised to the peerage, with the title of Lord Stowell. Our apology for occupying so much of our

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\* See 3 Phill. Int. Law, 368 – 373; 1 Kent, 152, 153; Wheaton's Int. Law, Part IV. Chap. 3, Sect. 25.

space with these extracts is, that the volume in which the judgments are published is not of ready access to general readers.

Case of the *Orozembo*, 6 Robinson's Adm. Rep. 430 - 439. This was a case of an American vessel,

"that had been ostensibly chartered by a merchant at Lisbon, 'to proceed in ballast to Macao, and there to take a cargo to America,' but which had been afterwards, by his directions, fitted up for the reception of three military officers of distinction, and two persons in civil departments in the government of Batavia, who had come from Holland to take their passage to Batavia, under the appointment of the government of Holland. There were also on board a lady and some persons in the capacity of servants, making in the whole seventeen passengers."

"*Sir William Scott*. . . . . That a vessel hired by the enemy for the conveyance of military persons is to be considered as a transport subject to condemnation has been in a recent case held by this court, and on other occasions. What is the number of military persons that shall constitute such a case, it may be difficult to define. In the former case there were many, in the present there are much fewer in number; but I accede to what has been observed in argument, that number alone is an insignificant circumstance in the considerations on which the principle of law on this subject is built; since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition. To send out one veteran general of France to take the command of the forces at Batavia, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater, and, therefore, it is what the belligerent has a stronger right to prevent and punish. *In this instance the military persons are three; and there are, besides, two other persons, who were going to be employed in civil capacities in the government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which the question has been agitated; but it appears to me, ON PRINCIPLE, to be but reasonable that, whenever it is of sufficient importance to the enemy that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations.*

"It has been argued, that the master was ignorant of the character of the service on which he was engaged, and that, in order to support the penalty, it would be necessary that there should be some proof of delinquency in him, or his owner. But I conceive that is *not* necessary. It will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. In the case of the Swedish vessel there was no *mens rea* in the owner, or in any other person acting under his authority. The master was an involuntary agent, acting under compulsion, put upon him by the officers of the French government, and, so far as intention alone is considered, *perfectly innocent*. In the same manner, in cases of *bona fide* ignorance, there may be no actual delinquency; but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation. . . . .

*"If it has appeared to be of sufficient importance to the government of the enemy to send them, it must be enough to put the adverse government on the exercise of their right of prevention."*

Case of the *Atalanta*, 6 Rob. Adm. Rep. 440 - 460.

"Sir William Scott. . . . . This being the fact then, that there were on board public despatches of the enemy, not delivered up with the ship's papers, but found concealed, it is incumbent on the persons intrusted with the care of the ship and her cargo to discharge themselves from the imputation of being concerned in the knowledge and management of this transaction. . . . .

"Not to have pointed them out to the attention of the captors amounts to a fraudulent dissimulation of a fact, which, by the law of nations, he was bound to disclose to those *who had a right to examine, and possess themselves of all papers on board*. . . . .

"That the simple carrying of despatches between the colonies and the mother country of the enemy is a service highly injurious to the other belligerent, is most obvious. . . . . It is not to be argued, therefore, that the importance of these despatches might relate only to the civil wants of the colony, and that it is necessary to show a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered, in the contemplation of law, as an object of hostility, although not produced

by operations strictly military. How is this intercourse with the mother country kept up in time of peace? By ships of war, or by packets in the service of the state. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy state, and is justly to be considered in that character. Nor let it be supposed that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. . . . .

“Unless, therefore, it can be said that there must be a plurality of offences to constitute the delinquency, it has already been laid down by the Superior Court, in the *Constitution*, that fraudulent carrying the despatches of the enemy is a criminal act, which will lead to condemnation. Under the authority of that decision, then, I am warranted to hold, that it is an act which will affect the vehicle, without any fear of incurring the imputation, which is sometimes strangely cast upon this court, that it is guilty of *interpolations* in the laws of nations. If the court took upon itself to assume *principles* in themselves novel, it might justly incur such an imputation; but to apply established principles to new cases cannot surely be so considered. All law is resolvable into general principles. The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not *new*, nor is it justly chargeable with being an *innovation* on the ancient law; when, in fact, the court does nothing more than apply old principles to new circumstances. . . . .

“To talk of the confiscation of the noxious article, *the despatches*, which constitutes the penalty in contraband, would be ridiculous. There would be *no* freight dependent on it, and therefore the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle. . . . .

“The general rule of law is, that where a party has been *guilty of an interposition in the war*, and is taken *in delicto*, he is not entitled to the aid of the court to obtain the restitution of any part of his property involved in the same transaction. It is said that the term



‘interposition in the war’ is a very general term, and not to be loosely applied.”

Case of the *Susan*, 6 Rob. Adm. Rep. 461, note.

“The *Susan*, an American vessel, captured on a voyage from Bordeaux to New York, having on board a packet addressed to the Prefect of the Isle of France (of which it did not appear that it contained more than a letter, providing for the payment of that officer’s salary). The master had made an affidavit, averring his ignorance of the contents, and stating that the packet was delivered to him by a private merchant, as containing old newspapers and some shawls, to be delivered to a merchant at New York. The insignificance of such a communication, and its want of connection with the political objects of the war, were insisted upon. But the court overruled that distinction, under observations similar to those above stated; and on the plea of ignorance observed, that, without saying what might be the effect of a case of extreme imposition practised on a neutral master, notwithstanding the utmost exertions of caution and good faith on his part, it must be taken to be the *general rule*, that a master is not at liberty to aver his ignorance, but that, if he is made the victim of imposition, practised on him by his private agent, or by the government of the enemy, he must seek for his redress against them.”

Case of the *Caroline*, (from which citations have already been made,) 6 Rob. Adm. Rep. 461–470.

“This was a case of the same general class as the preceding, on the question of *despatches*, found on board of an American ship, which had been captured with a cargo of cotton and other articles, on freight on a voyage from New York to Bordeaux. In this case the despatches were those of the French Minister and the French Consul in America, going to the departments of government in France.”

“*Sir W. Scott*. . . . In this case a distinction was taken, very briefly, in the original argument, which I confess struck me very forcibly at the moment, that carrying the despatches of an ambassador, situated in a neutral country, did not fall within the reasoning on which the general principle is founded; and I cannot but say, that the further argument which I have heard on that point, and my own consideration of the

subject, have but confirmed the impression which I then received of the solidity of this distinction. . . . .

"It has been asked, What are despatches? To which, I think, this answer may safely be returned: that they are all official communications of official persons on the public affairs of the government. The comparative importance of the particular papers is immaterial, since the court will not construct a scale of relative importance, which in fact it has not the means of doing, with any degree of accuracy, or with satisfaction to itself. It is sufficient, that they relate to the public business of the enemy, be it great or small. . . . . It is not to be said, therefore, that this or that letter is of small moment; the true criterion will be, Is it on the public business of the state, and passing between public persons for the public service? *That* is the question. . . . . But if the papers so taken relate to public concerns, be they great or small, civil or military, the court will not split hairs, and consider their relative importance. . . . .

"The circumstances of the present case, however, do not bring it within the range of these considerations, because it is not the case of despatches coming from any port of the enemy's territory, whose *commerce* and communications of every kind the other belligerent has a right to interrupt. They are despatches from persons who are in a peculiar manner the favorite objects of the protection of the law of nations, *ambassadors*, resident in a neutral country, for the purpose of preserving the relations of amity between that state and his own government. . . . .

"It has been argued truly, that, whatever the necessities of the negotiation may be, a private merchant is under no obligation to be the carrier of the enemy's despatches to his own country. Certainly he is not: and one inconvenience, to which he may be held fairly subject, is that of having his vessel brought in for examination, and of the necessary detention and expense. He gives the captors an undeniable right to intercept and examine the nature and contents of the papers which he is carrying; for they *may* be papers of an injurious tendency, although not such, on any *a priori* presumption, as to subject the party who carries them to the penalty of confiscation, and by giving the captors the right of that inquiry, he must submit to all the inconvenience that may attend it. Ship and cargo restored *on payment of captors' expense.*"

It will be found, we think, from a careful examination of these opinions, that the general principle applicable to the case is, that the subject or citizen of the neutral nation may not do anything directly auxiliary to the warlike purposes of a belligerent, or, as it is expressed in other words, anything which has a direct tendency to promote his warlike operations ; and that the transportation of agents whose business is to promote or facilitate any hostile operations, or of despatches which have, or may be presumed to have, a hostile character, is a rendition of aid to the belligerent which justifies the capture of the persons and despatches, and if done with knowledge, actual or constructive, is such a violation of neutrality as authorizes the capture and confiscation of the neutral vessel.

Speaking of the right of search, it has been said : " The only security that nothing is to be found inconsistent with amity and the law of nations is the right of personal visitation and search, to be exercised by those who have an interest in making it." We have here another expression of the general principle which regulates neutral rights and duties. It is not merely that the neutral is not warranted in carrying this or that article, or this or that person. He is not to carry anything which is inconsistent with the amity which subsists between his nation and the belligerent, and which he should maintain toward the belligerent.

Having ascertained the principles which are applicable, we turn again to the facts of this case. Probably no one doubts that Messrs. Mason and Slidell were the public agents of the Confederate States, charged with all manner of duties of a belligerent character. But Great Britain may reasonably ask for some evidence of the fact, as a justification for their removal from the Trent. The proof will doubtless be found to be abundant, but our space permits only two or three suggestions. In the first place, there is the message of Mr. Davis, in which he states that they are commissioned, and speaks of them as " Ministers," showing them to be public agents for

the promotion of the interests of the revolutionary government.

In the next place, there is a conclusive presumption that their agency was of a belligerent character, because the people of the Confederate States, being in rebellion, waging a civil war, and acknowledged only as a belligerent power, whatever is to be done for their success is necessarily of a belligerent character. The voyage of their agents to Europe was "directly auxiliary to the warlike purposes" of the Confederacy, and as hostile as if they had been officers or soldiers on their way to aid the enemy. An attempt merely to procure an acknowledgment of the independence of the Confederate States, while the United States are surrounding them with forces by land and sea, is of itself an act of hostility to the United States. The object could only be encouragement and aid in the prosecution of the war, as there is no practical independence.

Similar remarks apply to the despatches. That such documents were on board is not now concealed. The failure of Captain Wilkes to find them has been a matter of exultation. Lieutenant Fairfax was not bound to search for them after the captain of the Trent refused to show his passenger list or to give any information. He might well suppose that they were then beyond reasonable search, perhaps concealed by some of the ladies connected with the agency, in what the Boston Post, speaking of the secret transmission of traitorous correspondence by Secession ladies in the vicinity of Washington, termed "the holy precincts of their nether garments." The Confederate States had no minister, nor any consul, in Europe; but they had agents there actively attempting to procure an acknowledgment of their independence, and engaged in purchasing and transmitting munitions of war to the Southern ports. The despatches, then, must be presumed to relate to these subjects.

The fact that the voyage of the neutral vessel was from one

neutral port to another would not have exempted these persons from capture, even if they had been ambassadors from a recognized nation, their mission being of a hostile character. *A fortiori*, it cannot exempt them when they are mere agents. The character of hostility which necessarily attaches to them as the public agents of a mere belligerent power, proceeding with despatches which from the nature of the case must be presumed to be to hostile agents and for hostile purposes, shows a right to capture them, even if an ambassador might be exempted on such a voyage because he was a "*middlesman*." We have the distinct opinion of Sir William Scott that the transportation of civilians may be ground of forfeiture.

The neutral vessel was rendering aid in the accomplishment of these hostile purposes, just as much as she would have been if her voyage had been direct from the belligerent port. The neutral right, therefore, cannot protect the hostile agent, whether there was or was not knowledge. The want of knowledge might protect the vessel. But here was ample evidence to charge the captain of the Trent with full knowledge of the character of hostility; and it may probably be shown that the embarkation at Havana was with sufficient pomp and circumstance to constitute plenary evidence, if there were no other.\*

The Trent was a private passenger packet, with the advantage of a contract to carry the mails. She was a common carrier of passengers, and perhaps of goods also, but had no more of the character of a government vessel than the railroad car which carries the mail and the mail-agent, under a contract with the postmaster-general, has the character of a government vehicle. She was therefore liable, under the circumstances, to capture, and to confiscation also.

But here comes another, and it would seem, from recent suggestions, the main point to be considered. The Trent was

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\* See Appendix, Note B.

not captured. It is said that for this reason the proceedings are all irregular, and that a demand for a delivery of the prisoners is to be made by the British government, founded upon the neglect to make the capture, and the consequent lack of any proof of a right to take the persons. This is quite too narrow a view of the matter, and we shall not believe, until we have demonstrative assurance, that the law officers of the Crown will place themselves upon such a small and slippery foundation. We shall not enlarge upon the ill grace with which Great Britain would urge the objection, not that Mason and Slidell could not be taken, but that Captain Wilkes did not capture the steamer, send her in for trial and confiscation, and in so doing delay her Majesty's mails, and derange the business of all the passengers and others concerned in the regular trip of the vessel,—that there was therefore no adjudication of a prize court to show that the persons could be captured, and no other evidence would be received. Nor need we show what a gross outrage it would be to fasten a quarrel upon the nation whose officer had been guilty of such an act of comity and favor. If blood ever cries to Heaven for vengeance, it would be the blood shed in a war having such a foundation. And if all Christendom did not cry, Shame! it would show that the part of it which failed in the performance of that duty to humanity had lost all consciousness of the difference between right and wrong. Such a failure to do Great Britain an injury may possibly be made a *pretext* for war. It can never be the foundation of a *point of honor*, requiring an apology.

But it is argued, that in no other way than by sending in the vessel can it be shown by regular proof that the right to seize these persons existed; and therefore, that, by reason of the failure to send in the vessel, we cannot establish the right of seizure. It is alleged that it has always been the law of the world, that every cruiser making a seizure on board of a vessel shall bring the vessel in, and subject the lawfulness of

the seizure to adjudication in a prize court; and that there is one excuse only, and that is a want of force on the part of the captors to man the prize. Very well, we have one case, then, in which it is not necessary to establish the right to seize, by the decision of a prize court. Now suppose that Captain Wilkes had seized the despatches, and, taking them and Messrs. Mason and Slidell on board of the *San Jacinto*, (as we suppose he had a right to do, for safety, if he had a right to seize the *Trent*,) had then put a prize crew on board of her, and that she had afterward foundered at sea, or been captured by a Confederate privateer. The proceedings in admiralty for confiscation are *in rem*; and the *thing* being gone, no evidence of the right to seize could be had through the adjudication of a prize court. This would not have discharged the persons, nor forfeited the right to withhold the despatches. Here, then, seems to be another case.

We readily admit that the officer making a seizure cannot confiscate the property. If a judgment of confiscation is sought, the property must be libelled. The vessel is sent in as prize, and because she is prize, and is to be disposed of as prize; and not because she is necessary as evidence. Evidence other than that found on board the vessel may be received. (6 Robinson, 351, *Case of the Romeo*.)

But we have seen by the opinion of Sir William Scott, that *despatches are not the subject of confiscation; and it is at least equally clear that Messrs. Mason and Slidell are not so. If the vessel had been sent in, there could not have been any proceeding in the prize court against them or the despatches, and of course no judgment against either.* It is true that, the violation of neutrality by the transportation of the persons and of the despatches being the alleged ground of the seizure and of the claim of forfeiture, the question whether the persons were to be regarded as hostile agents, whether the despatches were of a hostile character, and all other questions affecting the right to seize, would be directly before the court,

and would be determined there, *for the purposes of that case ; that is, for the purpose of deciding whether the vessel was liable to confiscation or seizure, but no further. The judgment of the prize court would not operate upon the persons or papers.* While, upon the ordinary principles of law, in the absence of fraud or gross mistake, Great Britain would be bound to respect and abide by the decree of the court, so far as regarded the vessel, as the United States have done in relation to the decisions of Sir William Scott, there would be nothing in the judgment of the court to prevent that government from claiming of the United States the persons and papers, on evidence to be adduced in support of the claim, if it was believed that the opinion of the prize court was erroneous.

The distinction between evidence necessary to prove an issue, and the matter in issue, is familiar to every sound lawyer. A man is indicted for stealing the property of A. B., and in order to procure a conviction it must be proved, to the satisfaction of the jury, that the property alleged to have been stolen was the property of A. B., and this being done, the defendant is convicted. But this will not prevent C. D. from afterward sustaining a suit, to recover the property or its value, on evidence that it in fact belonged to him. It may be said that the reason is, that C. D. was not a party to the proceedings under the indictment, and so not bound by the proceeding there ; but that in the prize court, where the proceedings are *in rem*, all persons interested in the property are regarded as parties, and bound by the decree. Admit it. But they are parties only as to the matter in issue, and not as to the evidence ; and they are bound therefore only so far as the judgment goes, that is, by the confiscation of the vessel.

We claim, then, to have shown that the seizure, and even the confiscation, of the vessel would have determined nothing in relation to Messrs. Mason and Slidell, except for the purpose of the inquiry, Prize or not prize ? that the judgment in the prize court would in no wise have operated upon them ; and



that the opinion which that court entertained, so far from being conclusive on the British government in relation to their capture, would not, in a legal point of view, be even *prima facie* evidence. In a diplomatic correspondence between that government and the United States, it might, if it existed, be used as evidence; but other evidence would be equally admissible on either side. On the other hand, the judgment of the prize court releasing the vessel, based upon the expressed opinion of the judge that the persons were not liable to capture, and that the neutral vessel was in the regular exercise of her rights, while it may have furnished ground for an application to the government for their discharge, would not have been legal evidence of a right to their liberty.

We maintain, therefore, that all questions respecting the legality of the seizure of persons on board of neutral vessels, so far as they affect the persons themselves, or the relations of the government to which they belong and that making the seizure, are either legal questions for courts of common-law jurisdiction, or political questions to be settled by negotiation, if they can be settled in that mode.

If these positions are correct, the conclusion cannot be escaped that the capture of the vessel was not necessary, either as matter of substance or of form, in order to justify the capture of the persons. "*Lex neminem cogit ad vana seu inutilia.*" "*Utile per inutile non vitiatur.*"

But it may be asked, Has the captain of a belligerent cruiser a right to overhaul the merchant-vessel of a neutral nation, and take men out of her, on the plea that they are enemies, without any adjudication as to the right to make the capture? We answer, Certainly, if he can make proof of the right afterward. There can be no adjudication at the time. He does it on his responsibility and the responsibility of his government, if the right cannot be established. If he may seize vessel, crew, cargo, and passengers on this responsibility, and send them all into port, surely he may seize the hostile

passengers who give occasion for the capture. In fact, if Captain Wilkes had seized the vessel, it would have been his duty to take Messrs. Mason and Slidell on board his own vessel for security, and on his arrival to report, and deliver them into the custody of the government, which might at once have released them, and this without affecting the proceedings against the vessel.

Further, a party who has a right may waive that right; certainly, if others are not thereby prejudiced. The only parties interested in favor of the capture of the Trent were the United States and the officers and crew of the San Jacinto. Captain Wilkes, in behalf of the United States, and for himself, his officers, and crew, waived the right to make the capture; and the government has sanctioned that proceeding. Is Great Britain prejudiced?

The speeches at the banquet of the Lord Mayor of London certainly did not indicate a rupture of the friendly relations between the United States and Great Britain within a very short period; but it must be admitted that this furnishes no absolute assurance.

If Great Britain insists upon the delivery up of the prisoners, and the Cabinet at Washington surrender them *upon the ground that the demand is a distinct abandonment of the doctrines which she and her prize courts have heretofore so persistently maintained*, the people will acquiesce, and she may yet believe that she has gained nothing by the course thus pursued. If she demand an apology because *the United States have merely followed out those doctrines*, we venture the opinion that she will not get it.



## A P P E N D I X .

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### NOTE A. PAGE 32.

THE United States have for a long period, in treaties and otherwise, endeavored to procure the introduction of certain principles into the law of nations, different from those heretofore held by Great Britain, respecting the rights of neutrals, — among them, the principle that the neutral flag should cover the property of an enemy not contraband of war. The Congress at Paris in 1856 adopted this with other principles; and the United States having offered to become a party to that adoption, the principle may perhaps be recognized hereafter, although the accession of the United States to the declaration of the Congress at Paris has not been received.

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### NOTE B. PAGE 66.

The following extracts show that Dr. Phillimore recognizes the right of the belligerent to search and seize where the voyage is from one neutral port to another neutral port. He puts that as a case where there is less to excite the vigilance of the master of the neutral vessel, and one where some allowance should be made for any imposition practised on him.

“It is indeed competent to those intrusted with the care of the ship on board of which such despatches are found, to discharge themselves from the imputation of being concerned in the knowledge or management of the transaction. But the presumption is strong against the ignorance of the master of the ship; and when he has knowingly taken on board a packet or letter addressed to a public officer of a belligerent government, the plea of the insig-

nificance of the communication, and its want of connection with the political objects of the war, will not avail him; nor, except perhaps in an extreme case of imposition practised upon him, will the plea of ignorance of the *contents* of the despatches avail him: his redress must be sought against the person whose agent or carrier he was.

“ With respect to such a case as might exempt the carrier of despatches from the usual penalty, it is to be observed that *where the commencement of the voyage is in a neutral country, and to terminate at a neutral port, or at a port to which, though not neutral, an open trade is allowed, in such case there is less to excite the vigilance of the master; and therefore it may be proper to make some allowance for any imposition which may be practised on him. But where the neutral master receives papers on board in a hostile port, he receives them at his own hazard, and cannot be heard to avow his ignorance of a fact with which, by due inquiry, he might have made himself acquainted.*” — 3 *Phill. Int. Law*, 374 (published in 1857).

It may be admitted that in such case, if, without knowledge on the part of the master, and with nothing to excite suspicion, he, in the ordinary course of his business, carries contraband goods intended for a belligerent, or the officers, soldiers, agents, or despatches of a belligerent, this should not furnish cause for the confiscation of the vessel. But neither the fact that the immediate transit was from one neutral port to another, nor the want of knowledge of the master, furnishes a reason why the contraband goods intended for the belligerent, or the persons in his service, or his despatches, should have active transportation, for the purposes of the war, by the neutral vessel, and at the same time immunity from capture because of her neutrality. The vessel cannot be regarded as the *territory* of the neutral under such circumstances, for territory is not a vehicle of transportation.











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THE

CHARACTER OF THE REBELLION,

AND

THE CONDUCT OF THE WAR.

BY JOEL PARKER.

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## THE REBELLION AND THE WAR.

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[From the North American Review, for October, 1862.]

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1. *An Ordinance to dissolve the Union between the State of South Carolina and other States united with her under the Compact entitled "The Constitution of the United States of America," passed unanimously at 1.15 o'clock, P. M., December 20, 1860. Charleston Mercury Extra.*
2. *Message of PRESIDENT DAVIS. National Intelligencer, May 7, 1861.*
3. *Speech of HON. J. A. McDOUGALL, of California, on the Confiscation of Property, delivered in the Senate of the United States, March 12, 1862. Washington. 1862.*
4. *The Prayer of Twenty Millions. Letter from HORACE GREELEY to Abraham Lincoln, President of the United States. New York Tribune, August 20, 1862.*
5. *Letter from PRESIDENT LINCOLN to Horace Greeley. New York Tribune, August 23, 1862.*

WE have placed the title of the Ordinance of Secession by the Convention of South Carolina at the head of this article, not only because it was the first in time, but also because it shows the form and manner in which it has been supposed that secession was to be accomplished. For this last reason, as it is very brief, we copy it entire, in these words, to wit: —

"We, the people of the State of South Carolina, in convention assembled, do declare and ordain, and it is hereby declared and ordained, —

"That the ordinance ordained by us in convention on the 23d day of May, in the year of our Lord 1788, whereby the Constitution of the United States of America was ratified, and also all acts and parts of acts of the General Assembly of this State ratifying amendments of the said Constitution, are hereby repealed; and that the Union now subsisting between South Carolina and other States under the name of 'The United States of America' is hereby dissolved."

It will be observed that it appears as a simple repeal, or attempt to repeal, the ordinance by which the people of the State adopted the Constitution of the United States, thereby uniting with the people of the other States in the establishment of a general government over the whole. This attempt to repeal an act which is in its very nature irrevocable has been followed substantially in the other seceding States, with such difference of formula as the difference of circumstances under which they entered into the Union required. We shall have occasion to note hereafter, on the supposition that the repeal could be legally and constitutionally operative, that some of the important incidents and consequences which have been claimed as attaching to it are but mere unjust demands and exactions upon the United States.

That part of the Message of Jefferson Davis to the Confederate Congress which relates to, and endeavors to explain and assert the legal validity of, the so-called right of secession, we reviewed, in an article on that subject, in our number for April, 1861. We recur to the Message for the purpose of examining the reasons which are supposed to justify the actual secession, arising from wrongs and grievances on the part of the United States prior thereto. Those reasons are set forth at large in an extract from the document in the article just mentioned. This Message to the Confederate Congress was designed to sum up in plausible phraseology the particulars

of the several bills of indictment which the seceding States deemed themselves authorized to prefer against the United States ; and a reference to these specifications is sufficient, therefore, to show the character of the rebellion in its inception, as set forth by its own leaders. The allegations against the Northern States and the people of those States seem to resolve themselves into five particulars :—

1. The rise and growth in the Northern States of a political school which has persistently claimed that the government formed by the Constitution was not a compact between States, to secure the blessings of liberty and independence against foreign aggression, but was in effect a national government set up above and over the States.

2. The imposition of burdens on commerce, as a protection to the manufacturing and shipping interests of the North.

3. The assertion at the North, as an undeniable axiom, that the theory of the Constitution requires that in all cases the majority shall govern.

4. A persistent and organized system of hostile measures against the rights of the owners of slaves in the Southern States.

5. The organization of a great party for the purpose of obtaining the administration of the government, with the avowed object of using its power for the total exclusion of the Slave States from all participation in the benefits of the public domain, and of surrounding them entirely by States in which slavery should be prohibited ; and the success of the party, thus organized, in the election of its candidate for the Presidency.

It is to be remarked, that much of the matter of grievance consists of speeches, of dogmas, and of laws relating to persons claimed as fugitive slaves which were never executed, and that little of actual injury is set forth, unless it be found in the election of President Lincoln, who was not the Southern

candidate. This recital of Southern grievances and wrongs, in the official Message to the Confederate Congress, cuts a very sorry figure by the side of "the glittering generalities of the Declaration of Independence."

The first and third of these charges may be disposed of in a few sentences. How far the organization of the government had other objects than that of securing the people against foreign aggression, may readily be seen by referring to those parts of the Constitution which grant powers to Congress, and prohibit action by the States in certain cases. These parts show very conclusively that the attempt of Mr. Davis to represent the government of the United States as one created solely, or mainly, "to secure the blessings of liberty and independence against foreign aggression," is a gross misrepresentation. To this it may be added, that the notion of a national government, which is charged upon a political school of the Northern States, has been equally the notion of many learned, wise, and popular men in the Southern States. Edmund Randolph, one of the deputies of Virginia, laid before the Convention which framed the Constitution sundry propositions "concerning the American Confederation and the establishment of a national government," May 29th, 1787, in the form of resolutions. These resolutions provide for the establishment of a "national legislature," "a national executive," and "a national judiciary." The principles of these resolutions entered very largely into the construction of the Constitution as subsequently adopted.

We are not aware that the democratic dogma, that the majority of the people must govern in a republic, was more universally accepted at the North than at the South, until it appeared from the increase of population that the North would soon not only have such majority, but perhaps would be disposed to apply the principle. From the time it became probable that the South would lose the ascendancy which had

long been enjoyed, — partly by means of the representation based upon their slaves, and partly by the co-operation of the Democratic party at the North, — the dogma that the majority of the people had the right to rule became very distasteful to the leading Southern politicians; but we must admit our surprise to see this gravely put forth as one of the grievances which in a republican government requires revolution or secession.

The second, fourth, and fifth specifications of grievance in Mr. Davis's Message — to wit, the protection to manufactures and the opposition to slavery — require a more extended notice. Whoever attempts to judge respecting the merits or demerits of the rebellion, must not commence his investigation at the election of Mr. Lincoln; nor at the passage of any tariff law, even as far back as that of 1824; nor at the agitation of Garrison and his compeers, Foster, Pillsbury, the Abbys Kelly and Folsom, and Wendell Phillips, respecting slavery; nor at the passage of Personal-Liberty Laws in several of the States; nor at the recent opposition to the extension of slavery into the Territories; nor even at the struggle against the admission of new States without a prohibition of slavery therein, as in the case of Missouri, in 1819 and 1820. The foundation of the present controversy between the Southern and the Northern people dates farther back than all these.

How the imposition of burdens on commerce would protect any shipping interest, the writer of the Message does not explain; but we let that pass. The gravamen of the whole charge respecting protective duties is founded on the most gross misrepresentation. The protective policy had its origin with the South, and the Northern people adopted it only when their industry had been driven into channels which required it. That they have since been in favor of it furnishes no just ground of complaint against them. For a long period after the Revolution, the people of the North were mostly agricul-



turists, except upon the seaboard, where there were shipping interests of great magnitude.

There were extensive household manufactures of cotton and wool, mainly for home consumption. The first protective duty was a specific duty of three cents a pound on cotton, to encourage the production of that article in South Carolina and Georgia, and this burden was borne by the manufacturers and consumers of the North. The embargo, which struck almost a death-blow to the shipping interest of New England, was a Southern rather than a Northern measure. The protective tariff of 1816 was Mr. Calhoun's tariff, passed by Southern votes, — justified, we admit, to some extent, in order to preserve large manufacturing interests which had grown up during the war. When it was found that the Northern people, accommodating their industry to the state of things which had been forced upon them, were deriving a greater benefit from manufactures than the South, slave labor being ill adapted to that branch of industry, a change came over the spirit of the Southern dream, and a protective tariff was found to be a Northern invention, and a great political grievance. It is not wonderful that the North, which had been obliged to change the course of its industry by reason of non-intercourse, embargo, and war, should not have been ready to change back again, to the destruction of the interests which had been brought into existence and fostered by those measures.

The amount of the losses of slaves occasioned by all the Personal-Liberty Laws of the States, and all the efforts of "Liberators" and "Heralds of Freedom," and of Abolitionists in Congress and elsewhere, up to the time of this present warfare, will not begin to compare with the pecuniary losses of the Northern States, at different times, in their navigation and their manufacturing interests, occasioned by Southern measures and Southern votes.

The alleged inequality of the tariff is not admitted. The South has, as we believe, had as great a measure of protection for all products which by reason of foreign competition required it, as the North. Supposing, however, that an inequality has existed, by reason of which the South has paid a greater share of duties than the North, there has been no injustice, because the revenue of the country is derived mainly from the duties imposed on importations, instead of direct taxation, from which source it was originally expected that the revenue would be derived, and of which the Slave States were by agreement to pay an unequal proportion, on account of their unequal representation in Congress. No tariff can operate with perfect equality. Taxation in any form never does so. If the relative proportion paid by the Slave States in the shape of duties, and of increase of price in consequence of duties, is not greater than the relative proportion of those States would be if the revenue were raised by direct taxation, under an apportionment of that taxation which should embrace three fifths of their slaves, according to the provision of the Constitution,—and the revenue raised by the duties is graduated by the wants of the government for its annual expenditure, as has been the design that it should be for many years past,—then we say that those States have no just cause of complaint on that score. We shall see this more clearly as we proceed. It certainly cannot be shown, that, of all the duties, the Slave States have borne as large a share as they must have paid of direct taxes had the revenue been raised in that manner. It must be borne in mind, that the duties assessed on importations are often borne by the producer, and not by the consumer. A memorable instance of this may be found in the duty on molasses, imposed by the tariff of 1828, which was inserted in the bill by Southern votes, because it was supposed it would make the bill so distasteful to the North as to defeat it. The North took it, “drugged as it was,” and the price

was not materially increased. The tariff of 1842 discarded to a great extent protective duties, and they have hardly been heard of as a cause of complaint for several years, a better subject for agitation having been found in slavery.

The origin of the difficulties which have resulted in the attempted secession is to be sought as far back as the adoption of the Constitution itself, and perhaps earlier. The question arose in the Congress of the Revolution, how the quota which each State ought to furnish toward the expenses of the war should be determined. It was at first agreed that apportionment should be made according to a valuation of property. But only one State—New Hampshire—furnished a valuation. Then it was suggested that the number of persons in each State might be taken as the basis. But delegates from Slave States immediately objected that slaves ought not to be included in the enumeration, because slaves did not produce as much as freemen. There was great debate upon the subject, which resulted in a compromise, by which three fifths of the number of slaves were to be added to the number of free persons.

In the Convention which framed the Constitution, the subject of revenue, which it was then believed, as we have already suggested, would be raised mainly by direct taxation, brought up the same question respecting the basis of apportionment. As before, there was an attempt to escape from an apportionment which should embrace slaves in the enumeration of persons. This resulted in another compromise, by which three fifths of the number of slaves were to be included in the enumeration of persons for the purpose of apportioning the taxes among the several States, and the Slave States were to be entitled to a representation upon the same basis,—the provision in the Constitution upon these subjects being in these words: “Representatives and direct taxes shall be apportioned among the several States

which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons." The principle of the Revolution, that taxation and representation ought to go together, was exemplified in this compromise. On this basis, the Slave States have had the benefit of a representation founded upon the number of their slaves, constantly increasing, until, according to the census of 1850, it actually amounted to twenty-one members, the slaves, however, having no vote in the election of them. The oligarchical democracy of the South has had so much of political advantage. But the burden of direct taxation, proportioned upon three fifths of the slaves, which was the equivalent, has almost wholly failed, because the revenue has been raised, with very limited exceptions, by duties on imports and by sales of public lands. As a necessary result, there has been a growing repugnance to the extension of slavery, aside from all moral considerations, on account of this unequal political representation, — an injustice which every extension of slavery, and every admission of a new Slave State, has aggravated.

It must be considered, also, that the Constitution, with this unequal representation, was made for the territory embraced in the treaty of peace with Great Britain. The admission of new States formed from territory acquired outside of those limits was not contemplated nor provided for, and every admission of a Slave State from such territory tends to a further extension of this inequality of representation. The admission of Louisiana, Florida, Arkansas, Missouri, and especially of Texas, furnishes, unquestionably, some of the reasons for a hostility to slavery which has borne fruit, perhaps, in Personal-Liberty Laws, as well as in efforts to exclude slavery from the Territories, in order that there shall not be an increase of Slave

States, and thereby a further extension of a representation already unjust.

Again : In considering the temper which led to the Personal-Liberty Laws, and to the restriction of the extension of slavery, we must by no means ignore the laws of some of the Southern States — South Carolina and Louisiana — upon the subject of free Negroes, under which persons of that class belonging to Northern vessels have been imprisoned without even an allegation that they had committed any offence, and by which they would have been sold into slavery, if the fees and charges of that imprisonment had not been paid. The attempt by Massachusetts to test the constitutionality of those laws, first, by the employment of counsel in those States, and, when that failed because counsel there declined to take a retainer, by sending Mr. Hoar as agent to South Carolina, and Mr. Hubbard to Louisiana, to institute suits for that purpose in the Courts of the United States, — and their subsequent expulsion from Charleston and New Orleans, under circumstances of great excitement and indignity, — have, in our belief, had more to do in exciting a bitter feeling of hostility to the institution of slavery, than all the speeches of any half-dozen orators or oratresses, white or colored. To say nothing of the preposterous pretension, that the question whether those laws were constitutional or otherwise should not be submitted to the consideration and determination of a judicial tribunal, or of the injustice necessarily attending their enforcement, — the circumstances of insult accompanying the expulsion of Messrs. Hoar and Hubbard were not likely to be forgotten by the people of Massachusetts, and the feeling thus excited has been largely extended to other States.

The repeal of the Missouri Compromise, and the subsequent attempt to force slavery into the Territory of Kansas by fraudulent voting and fraudulent returns, by a blockade of the Missouri River outside of the Territory, and by the murder of

peaceable citizens within it, may furnish some palliation and excuse for an excitement which would render Personal-Liberty Laws popular, even if such circumstances cannot prove their constitutionality. In pursuing the design and purpose of preparing the Territory so that when it became a State it would send two Senators and a Representative in sympathy with the South and devoted to Southern interests, no regard was had to personal or political rights. Fraud and injustice marked every step of the progress, and marauding bands from South Carolina and Georgia attempted to complete by force what fraud was not strong enough to accomplish. That corrupt politicians at the North should participate in this iniquity, was in character with their antecedents; and that demagogues at the North should avail themselves of the just indignation excited by such outrages, and endeavor to make political capital for themselves, on the other side, by inflammatory speeches and extreme measures, without regard to their constitutional obligations, was but a natural consequence.

In estimating the morality of the rebellion, it must be recollected that there has always been a strong party at the North sympathizing with the South, partly from political, and partly from personal associations; and a still larger number who have been willing to fulfil all their constitutional obligations, although they have been disposed, and are determined, no longer to give way to Southern insolence and aggression. It is to be noted further, that, at the very time when the rebellion was planned and broke out, five of the nine judges on the bench of the Supreme Court of the United States were from the Slave States, and that these, with one of the judges in the Free States, had expressed and recorded their opinion that slaveholders had a constitutional right to carry their slaves into the Territories, and hold them there, any legislation of Congress to the contrary notwithstanding. One other judge from a Free State did not see fit to record a dis-

sent to this doctrine, leaving himself free to assent to it at any time afterward, when his convictions of official duty should require such an opinion. We admit that this opinion of the six judges was a "*dictum*," and erroneous. We aver that it was perfectly outrageous, a gross usurpation of power deserving impeachment, because the question was clearly political, and not judicial. But it was quite improbable that those who had thus committed themselves to the interests of the South would retrace their steps, and the constitution of the Senate rendered impeachment hopeless. Secession was not required to secure or save any of the alleged rights of the South. If the Southern Senators had remained in their places, Mr. Lincoln and his Administration would have lacked the power to do evil to Southern interests, even if they had been so disposed. But it is true that the constitution of the House of Representatives was likely to be such, that the South could not rule Congress as it had been accustomed to do, and the incoming incumbent of the Presidential chair presented an absolute bar to Southern domination.

It may not be amiss to consider here two or three objections which have been raised against the attempt of the United States to suppress the insurrection, and which have been urged independently of the reasons alleged for the secession itself.

It has been contended that the attempt at coercion is in violation of the democratic principle that the people are entitled to govern themselves, and of the republican principle that this right to govern resides in the majority. It is alleged that the people of the Southern States are, on these principles, entitled to choose their own government; moreover, that not merely a majority of the people of the seceding States prefer to change their institutions by forming the Southern Confederacy, but that there is great unanimity among them in this particular.

The principles thus adduced are acknowledged as funda-

mental principles, and the fact of the unanimity to the extent mentioned may be admitted for the purpose of the argument. But who are "the people" who, upon the general principles thus stated, are entitled to govern themselves? It is not a few individuals in a community who possess this right of self-government. This is shown by the other principle, that the majority possess the right of determination. The dissent of a minority may be entitled to respectful attention, but it cannot furnish the rule of government. Then, again, who compose this majority of the people which is entitled to determine the form of government? Certainly not the majority of the people of any town, county, or borough; and as clearly not the majority of the people of any of the States, or of any number of States, in all the particulars for which government is instituted. To a certain extent, the majority of the people of a State may fashion the institutions of that State. So far as a change will not affect the Union, or violate the Constitution, directly or incidentally, they may act, because to that extent they are an independent community. But neither the majority of the people of a State, nor the whole people of it, can adopt any other than a republican form of government, because the United States guarantee such a form of government to all the States, and are bound to the whole to fulfil that guaranty by not permitting any one to deviate from the established form. Neither the majority nor the whole people of a State can change its institutions so as to coin money, levy duties on imports, enter into treaties with foreign governments, or do anything expressly or impliedly forbidden by the Constitution. So that upon the point in issue the question comes to this,—Is secession permitted by the Constitution? And we have heretofore shown that it is not, in reviewing Mr. Davis's Message.

The majority recognized in the republican principle is the majority of the community to be governed, or under govern-



ment. In this instance, the whole people of the United States, so far as the purposes for which the United States government was instituted, have alone the lawful right to change or alter that government, except as it may be altered in the manner prescribed by the Constitution, which has provided specific modes in which amendments may be made. That the Constitution was originally adopted by majorities of the people in the several States, does not affect the application of this general principle ; for by that adoption they became *one people* for the purposes of the government thereby instituted, although they were not so before.

We admit, that, if there is oppression too great to be borne, there may be rebellion, which may ripen into revolution ; but this is altogether different from the "right of secession," as we have heretofore shown ; the right of revolution in resistance of oppression being a personal right, and the so-called right of secession being set up as a State right.

Again : It has been urged that the course of the Southern States has been in accordance with, and in fact justified by, the course of the Colonies in their separation from Great Britain, and that, on the principles then maintained, the United States are wrong in resisting the attempted disruption of the Union. This seems a favorite position of some of our Transatlantic cousins, to say nothing of certain sympathizers on this side of the water. But, in truth, so far from the cases being *ad idem*, there is scarcely a similitude between them. A very brief reference to the contrast is all which our space allows us. We need not avail ourselves of the impassioned language of Colonel Barre, that the oppression of England planted the Colonies in America ; — it is sufficient that they were not planted by her care. When, by their indomitable industry, they had become worth her attention, the fostering care of the mother country was extended to them by the appointment of rulers over them, — in many instances, not from among themselves, but from

her own population ;— rulers who cared more for amassing fortunes through official corruption, than for the welfare of the people whom they governed. She was prompt to take the benefit of their military services against her ancient foe, the French. She loaded their trade with onerous imposts, and restrictions of which she bore no share. And when the wealth and industry of the Colonies became sufficient, she insisted upon raising a revenue from internal taxes, at the same time that she allowed them no representation whatever in Parliament, where these duties, restrictions, and taxes were imposed. These *impositions* at length became intolerable, and the Colonists determined upon resistance. She made the first war-like attack at Lexington, and again at Concord. They fought the war through in fair fields, and the separation was accomplished with no further effect upon the interests of Great Britain than the loss of so much of her colonial possessions. She was not rendered subservient to them, in their new state of independence, either by treaty or by geographical situation.

Now for the contrast. Part of the seceding States were originally Colonies, and united with the others in achieving their independence, or rather had it achieved for them. Most of the others are formed from territory purchased by the United States, and all have voluntarily come into the Union, under the Constitution, participating in all the rights derived under it, and assuming all the obligations which it imposes ; being received upon an equality with the older States. The statute-book is full of provisions for their advantage. The Indians have been removed from some of their borders at great expense, to say nothing of a violation of public faith, because they desired it and insisted upon it. If we recollect aright, the Florida war, undertaken to remove Billy Bowlegs from the Everglades, cost the United States some fifty millions of dollars. We have not the presumption to say that the present war is not sent by the God of justice in part as punish-

ment for the outrages committed in that war, and in the removal of the Cherokees from Georgia. The seceding States have had a representation in the national councils, not merely in equal proportions, but beyond that of the Free States, through the basis of their "peculiar institution." Their influence has directed the policy of the country in a greater degree than that of the Northern States. The Mexican war was waged mainly at their bidding. When they chose a protective tariff, the policy was protection. When they said that the tariff must be for revenue alone, it was made a revenue tariff, with only incidental protection to some interests, partly to secure certain votes. They have had more than a fair share of military and naval appointments. It has been the privilege of the North to furnish the sailors and a large proportion of the bone and muscle of the army. They objected to the distribution of "incendiary matter" — publications against slavery — through the mails, and the Post-Office Department prohibited it. They demanded mobs to put down abolition harangues, and the mobs were forthcoming; but the remote consequences were not favorable to them. They said that a more stringent Fugitive Slave Law was necessary, and one was enacted too stringent to subserve its own purpose, because it excited hostility from its injustice. When they wanted that Kansas should be a Slave State, the Missouri Compromise was repealed, and it was moreover found by grave judges that it was unconstitutional. The Democratic party of the North had so far acted in the interests of the South, as to lead the conspirators to rely upon that as an element of success in their secession. Commodore Stockton's declaration in the Peace Convention, that for every regiment raised at the North for the purpose of coercion, two would be raised to arrest its march, was only an expression of the sympathy upon which the conspirators had relied to carry them through without any very serious struggle on their part.

If they did not increase in population and wealth like their Northern neighbors, it was not by reason of any inequality of tariffs, or any other oppression, but by reason of the slavery which they cherished, and the unthrift attending their modes of living.

Notwithstanding the comparatively small increase of population in the South, there was for a long time no lack of increase in the number of Slave States. In fact, at one time there was an attempt to prevent the admission of a Free State, unless a Slave State were admitted to balance it; and this was long before Personal-Liberty Bills were thought of. Maine and Missouri were admitted within a few days of each other in 1820, the admission of the former having been delayed by the controversy in relation to the latter; Michigan and Arkansas were admitted on the same day in 1836; and Iowa and Florida were tied together in the same act, in 1845, although Texas had been admitted by herself three days before.

Up to 1852, out of eleven Presidents of the United States, seven were of the Slave States, five of them for two terms each. There had then been four Presidents from the Free States, three of whom held for a single term each. President Harrison died shortly after the commencement of his term, John Tyler being the Southern Vice-President; and General Taylor, one of the Southern Presidents, died in the earlier part of his term, leaving the administration to Millard Fillmore, a Northern Vice-President. The two Presidents who occupied the chair from 1853 to 1861 were "Northern men with Southern principles," having in their Cabinets Jefferson Davis, Cobb, Floyd, and Thompson. Finding that the sceptre was about to depart, the Southern leaders prepared for a rebellion. It would probably have come in 1856, if Fremont had been elected, although the Northern people could not believe that there was danger of it. The breach in the Democratic Charleston Convention, in 1860, and the nomina-

tion of Breckenridge, were designed to secure the election of a Republican candidate, and thereby to force the Southern States into secession.

The mode in which the rebellion commenced is in contrast with the colonial resistance to the authority of the mother country. The Colonists entered upon their rebellion by a fair, open, and manful opposition to measures of hardship and oppression. Three members of the Cabinet of Mr. Buchanan prepared the way for secession by a traitorous misuse of their official position, and a scandalous violation of their official oaths. Most of the Senators and Representatives of the States which have seceded conspired with them. The treason was concocted while the conspirators were in the service of the United States, and receiving pay from the United States, thus showing them to be worthy compeers of Benedict Arnold.

The legitimate result of the argument by which secession was supported, if the argument were correct, would be that the State itself which had seceded resumed thereby her State rights and State possessions. Secession, upon its own theory, would carry nothing with it belonging to the United States. But the secession argument is as flexible as india-rubber. The position that the Constitution is a political *compact* of confederation for political purposes, which is made the basis upon which the right of secession exists, is forthwith converted into an allegation that the compact is in the nature of a partnership, in which, if there is not a regular account of profit and loss to be stated, there is, according to the new Confederate law of partnership, a right of dissolution at the pleasure of any one partner, notwithstanding the contract made it perpetual; and upon the dissolution there is to be a division of stock, by which the Confederacy, which was not a partner, but born since the dissolution, is to be entitled to a share of the territories owned by the United States, to all the islands and fortifications, with their munitions of war,

which may be found along the coasts of the seceding States, and to the mints and sub-treasuries, and all the money and machinery therein. We must understand that these things are not claimed and taken under a right of revolution, which would give no claim except to that portion of government property which might fall into the hands of the insurgents, and be appropriated under the law of force; but this claim is made under the alleged right of secession, which, as we have seen, is described as the reserved right of a State to withdraw peaceably, by a repeal of the act by which it came into the Union. The colonial resistance to the mother country was coupled with no such claim of partition of territory.

We refer to but one other matter to complete the contrast between the Revolution of 1776 and this rebellion. By the second article of the treaty of peace with Great Britain in 1783, it was agreed, among other things, that the boundary of the United States, from the northwestern point or corner, should be "a line to be drawn along the middle of the said river Mississippi until it shall intersect the northernmost part of the thirty-first degree of north latitude"; and by the eighth article of the same treaty it was stipulated, that the navigation of the river, from its source to the ocean, should forever remain open to the subjects of Great Britain and the citizens of the United States. Great Britain has other means of access to her colonial possessions in America, and makes little if any use of the Mississippi to communicate with them. The stipulation of the treaty is, and has been, of very little practical importance to her, except as regards the navigation of that part of it which at the time of the treaty was in the possession of Spain. Spain then held Louisiana, lying on both sides of the river south of the thirty-first degree; but, having been afterward transferred to France, it came into the possession of the United States by the treaty of Paris, April 30, 1803. There are various provisions in the acts and laws

of the United States to secure the free navigation of the Mississippi to all the citizens of the United States, particularly in the acts for the admission of the States of Louisiana, Mississippi, and Missouri into the Union. The act for the admission of Louisiana contains the following clause: —

“*Provided*, that it shall be taken as a condition upon which the said State is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said State as to the inhabitants of other States and the Territories of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State; and that the above condition, and also all other the conditions and terms contained in the third section of the act, the title whereof is hereinbefore recited, shall be considered, deemed, and taken fundamental conditions and terms upon which the said State is incorporated in the Union.”

We are not clear that it may not be technically and legally maintained that Louisiana, by a breach of this condition, has “become *felo de se*,” and may be treated as having returned to her territorial *status*.

Now it is well known that almost the first act after the secession of Mississippi was the planting of a battery or batteries at Vicksburg, if we mistake not, in the first instance, and an interruption of all commerce on the river, except at the pleasure of the Secession authorities, resulting shortly in its being entirely closed. It was intended as a measure of coercion against the Northwest, to the prosperity of which the navigation is of vital importance, and it must be opened again, and held free to all, according to the treaty, laws, acts, ordinances, and conditions by which it was supposed to be originally secured. If the rebellion shall be successful, the river, from the northern line of Tennessee downward, is within the jurisdiction of a foreign state or states. The laws and conditions to secure the free navigation of it become a dead

letter, and the whole Northwest will be thus far "subjugated," and hold their title to the use of the river, from that time forth, at the pleasure of the seceding States.

The case stands thus. If the rebellion is suppressed, and the seceding States are "subjugated," they return to their places in the Union with all the rights and privileges which they had before, unless by the tenacity of their resistance they aid the Abolitionists in getting up another revolution, founded on immediate emancipation, through conquest or State suicide, and a prostration of State rights, not warranted by the Constitution. If, on the other hand, the secession becomes a successful revolution, the United States, and particularly the Northwestern States, are really brought into subjection, and hold their rights to the navigation of this great medium of internal commerce, and even of foreign commerce through the Gulf, at the pleasure of the Confederacy.

We pass from the general character of the rebellion, as it exhibited itself at the outset, to a brief consideration of the conduct of the war.

With respect to active warfare in the field, it must be admitted that the generalship exhibited by the rebel commanders, particularly in the month of August just passed, will not suffer by a comparison with that of the commanders of the United States. But here we must not overlook the fact, that, from their geographical position, their superior knowledge of the topography of the theatre of the active hostilities, and their greater resources for obtaining information respecting military movements by the aid of the inhabitants, they have had largely the advantage. There have been no better soldiers in the field than the greater portion of the troops of the Union. There have been too many of the officers who have obtained their commissions through political or personal favoritism.

The partial lack of success in the conduct of the war on the part of the United States, has been owing mainly to other



causes than those immediately connected with operations in the field.

We supposed, when Mr. Cameron vacated the War Office, that it was to be filled by one who, with the broad views of a statesman, discarding all considerations but those of country, would, by a vigorous prosecution of the war, conquer a constitutional peace. But we were mistaken, and reminded strongly of the frogs who desired a king. It is alleged that there have been jealousies among the generals of the army, causing disaster. Gray wrote in his *Elegy* :

“ The paths of glory lead but to the grave.”

Since the time of General Jackson, however, the American version has been that they lead to the Presidency; and, as might have been expected, on the breaking out of the rebellion there was a great demand for major-generalships and other generalships, colonelships, and other -ships, not merely by those who had made arms a study, and whose proper business it was, therefore, to suppress the rebellion, but by others, who were desirous of getting into those paths, and by their hangers-on, who were earnest that they should do so. If Mr. Secretary Stanton has had a determination that no general in the field should eclipse the glories of the War Office, the measures which have been taken in reference to field operations have been well adapted to prevent any of the competitors from being covered with glory. One of the uninitiated may, indeed, be astonished to find how one general may be played off against another, and one kingdom (that is, military department) may be divided against itself, until none of them can stand; and by such operations, assuredly, the Satan of the rebellion is not to be cast out. When we see a Secretary of War, in an order out of the regular course, complimenting a general who, by a forced march of the order of *dash*, is said to have put one fifth of his command in the hospital, and in-

serting in the order a sneer understood to be aimed at the General-in-chief for his inactivity ; and when we see him sending a letter to a newspaper, containing another sneer aimed at the same general for the prudence which, by means of discipline, had sought to "organize victory," we may be sure that some idea besides that of the suppression of the rebellion had obtained a lodgement in the War Office. In this last letter the Secretary, modestly declining all share in the honor of certain then recent victories, defers "to the spirit of the Lord, that moved our soldiers to rush into battle, and filled the hearts of our enemies with terror and dismay." And he adds: "We may well rejoice at the recent victories, for they teach us that battles are to be won now and by us in the same and only manner that they were ever won by any people or in any age since the days of Joshua, — by boldly pursuing and striking the foe." If the Secretary is still disposed to follow in the wake of Joshua, we may soon see a War-Office advertisement for the purchase of rams' horns. It seems never to have occurred to him, that, if your adversary has studied and practised the "science of fence," he may parry the blows aimed at him, and that you should at least have enough of strategy to prevent him from bestowing upon you in return a kick *a posteriori*. General Pope appears to have acted on the Secretary's strategy. He said, in one of his early orders, "Shame and disaster lurk in the rear"; and he found himself to be a true prophet.

But the War Office is by no means responsible for all our misadventures. The source of the greatest disasters, as well as of much minor suffering, has been the efforts of members of Congress, collectively and severally, to manage the war. The cry of "On to Richmond!" before the army had been disciplined, or even organized, wherever it had its origin, had its echoes in Congress. It has been said that the teamsters set the example of panic at Bull Run. We are not quite sure

that this is doing full justice to the field-m Marshals of Congress, who urged the advance in the first instance, went out as spectators, and certainly did not take "the paths of glory" on their return to Washington.

There is no lack of testimony that, so far as it may be deemed the duty of members of Congress to decry and defame the General-in-chief of the forces in the field, it has been most diligently performed. The *salons* of Washington, the hotels on the route to and from that place, and the highways and sidewalks, concur in testifying that in all the days of the year, and in all the hours of the day, there has been no lack of zeal on this behalf. The Chairman of the Military Committee in the Senate seems to have been specially detailed as skirmisher in this service. We submit that all these attacks upon the commander, whether the fire comes from the War Office or the halls of Congress, have a direct tendency to "discourage enlistments," and the provost-marshal should see to it.

In another department of the service, the evidence is not so direct and clear. If the historian of this war shall gain access to the sources of information, he cannot fail to give the country some light upon the proceedings of the "Committee of Congress on the Conduct of the War," besides what is contained in their voluminous report. The great object of war is to "punish our enemies." It is believed that the committee were practically adepts in this part of the science of war, and it is to be regretted that their modesty should have deprived the country of an exposition of their merits in conducting the hostilities on their part. It is supposed that in regard to another branch of modern warfare, that of "rewarding our friends," this committee were not novices; but, as in the case of testimony taken in chancery, until the time of publication arrives, the seal which shields their motives, and some of their actions, from inspection, cannot be broken.

The most astonishing blunder in the conduct of the war has

been the neglect to bring a sufficient force into the field at an earlier day. It required but the comprehension of two facts, by any one whose duty it was to have ideas upon the subject, to show him, in the first instance, that the numbers of the forces of the United States in the field must be wholly inadequate to the work assigned to them. These facts are, that the rebels are in the possession of the centre of the theatre of the war, and that the United States are operating on the circumference of it. The conclusion is at once reached, that the rebels have an advantage of position which requires us to place in the field at least two men to their one, — ay, even more than that. The facility with which they can mass their troops at any given point upon the circumference, either for defence or attack, has no corresponding advantage on our side. Until the severance of the railroad communication in Tennessee, by General Mitchell, Confederate troops could be transferred from Richmond to Corinth, and *vice versa*, in a very short period, without any knowledge of the movement by the Federal commanders. But the transfer of Union forces from Washington to Nashville, or from the latter place to any point outside of Tennessee and Kentucky where such troops might be needed, not only required great length of time, but it was impossible, under existing circumstances, to make such transfer without the knowledge of the Confederate authorities that the movement had begun long before it was finally terminated. We need only indicate the necessity for this greater force, without going further into the reasons for it. Yet, in the very teeth of this obvious consideration, the chairman of the Military Committee in the Senate, in March last, said in his place : —

“It was suggested, also, that we ought to stop recruiting. I agree to that. I have over and over again been to the War Office, and urged upon the Department to stop recruiting in every part of the country. We have had the promise that it should be done ; yet every

day, in different parts of the country, we have accounts of men being raised and brought forth to fill up the ranks of regiments. The papers tell us that in Tennessee, and other parts of the country where our armies move, we are filling up the ranks of the army. I believe we have to-day one hundred and fifty thousand more men under the pay of the government than we need or can well use. I have not a doubt of it; and I think it ought to be checked. I think the War Department ought to issue peremptory orders forbidding the enlistment of another soldier into the volunteer force of the United States until the time shall come when we need them. We can obtain them any time when we need them." — *Washington Globe*, March 29, 1862.\*

In accordance with the opinion thus officially expressed, the recruiting-offices were closed, and recruiting stopped, at the very time when at least half a million of men should have been put into camp and drilled for service. It was said that the recruiting-offices were expensive. A protracted warfare is much more so. In consequence of a lack of forces, the operations along the Atlantic seaboard have been confined to the coast, and General Burnside has not been able to penetrate into North Carolina, or the commanders at Port Royal into South Carolina or Georgia. It is unnecessary to specify other places where the same lack of troops produced like results. Still the cry went up, "On to Richmond!" and the better to enable the General-in-chief to accomplish that object, he was deprived of a large part of the force which had previously been under his command, by the creation of several departments in Virginia, with independent commanders. The idea upon which this was done must have been that a large army would encumber the general, and embarrass his operations. If General McClellan had succeeded in entering Richmond with the force under his command, unless he could have at the same time opened the James River, his whole army would inevitably have been overpowered.

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\* We are aware that Mr. Senator Wilson has denied that he made such statements, but the denial is entirely overborne by the affirmative evidence.

It has been so long admitted that slavery as it exists in the several States is a local institution, in no way under the control of the United States, that the politicians who regard emancipation as the great end to be accomplished by the war have been somewhat puzzled to find a plausible theory on which they can hope that the people at large will sustain them. They have from time to time put forth divers propositions having emancipation as the immediate or ultimate result. They are not content with the large measure of it which must certainly and necessarily attend the successful prosecution of the war and the suppression of the rebellion; but they want the war conducted with a view to immediate emancipation. Some of the proposed modes in which it has been contended that this might be accomplished were considered in the article on Constitutional Law in our number for April last. Of proclamations for the purpose under martial law,—of the conquest of the seceded States and holding them as territories under the general right of war as between independent nations, for the purpose of emancipation, as proposed by Mr. Conway,\*—and of the theory set forth in Mr. Sumner's resolutions, that those States have forfeited their State rights by State suicide, and thus fall under the exclusive jurisdiction of Congress, as other territories, and that thereupon certain of their peculiar local institutions are terminated,—we need not speak further. They seem to have been abandoned for other modes of conducting the war.

Judging from the course of the ultra abolitionists, in and

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\* On the theory of the government maintained by the rebels as the basis of the rebellion, the seceding States may be conquered, and held as territories. If the Constitution were a compact, and any State might lawfully secede at pleasure, the act of secession by a State would be perfect when it adopted an ordinance of secession. From that time, of course, on this theory, the seceding State becomes, as to the United States, a foreign state, and, in a war between them, the latter may be conquered, and thereafter held like any other conquered territory. All its laws may be changed at the pleasure of the conqueror.

out of Congress, it would seem that they supposed that what we lacked in troops we could make up by declarations or proclamations of emancipation, and with much greater effect. The fierce cry of "On to Richmond!" has been exceeded only by the fiercer cry for a proclamation of emancipation; and it has been urged with an earnestness which ought to be indicative of the conviction, that without such proclamation we could accomplish nothing, and with it could attain everything. Indeed, such has been substantially their declaration.

The formula of the argument by which this class of persons carry on the war at present is substantially this: — Slavery is the cause of the rebellion. In order to a successful prosecution of the war, we must destroy the cause. Nothing else can be effectual. We must strike at the root of the insurrection. And the axe which is to be laid at the root is — a proclamation. It has been contended that the President, under the war power, could issue a proclamation; and when the inquiry has been made, what authority the President has to proclaim emancipation, the answer has been, If he cannot do it as President, he may take the field, and do it as commander-in-chief. In fact the "we" of Mr. Horace Greeley do not need the aid of the war power to reach the conclusion that the President might declare emancipation. In his letter addressed to the President, entitled "The Prayer of Twenty Millions," it is said: —

"Had you, Sir, in your Inaugural Address, unmistakably given notice that, in case the rebellion already commenced were persisted in, and your efforts to preserve the Union and enforce the laws should be resisted by armed force, *you would recognize no loyal person as rightfully held in slavery by a traitor*, we believe the rebellion would therein have received a staggering, if not fatal blow. . . . .

"Had you then proclaimed that rebellion would strike the shackles from the slaves of every traitor, the wealthy and the cautious would have been supplied with a powerful inducement to remain loyal. As

it was, every coward in the South soon became a traitor from fear; for loyalty was perilous, while treason seemed comparatively safe. Hence the boasted unanimity of the South,—a unanimity based on rebel terrorism, and the fact that immunity and safety were found on that side, danger and probable death on ours. The rebels from the first have been eager to confiscate, imprison, scourge, and kill; we have fought wolves with the devices of sheep.”

We thus perceive what might have been done by a declaration or proclamation. Siege guns, shells, solid shot, telescopic rifles, and Minié bullets are as nothing when compared with a proclamation.

We shall not detain our readers by an argument to show that the President, with or without a cocked-hat, has no power to emancipate the slaves, even of rebels. We have no certain assurance that he might not, if he should act in accordance with the requirements of the “we” of Mr. Horace Greeley, become himself, officially, *felo de se*. But we trust that he will carefully abstain from any kind of suicide, and his answer to the requirements gives us great encouragement.

The war power under the Constitution acting by proclamation seems not, upon consideration, to have been regarded as entirely satisfactory by Congress, and thereupon that body undertook, in the shape of “An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes,” passed July 17, 1862, to provide for emancipation, in the shape of confiscation. Although the provisions of the act appear in a form somewhat different from those of a bill upon which the eloquent Senator from California made the speech, in March last, to which we refer our readers for a learned discussion respecting bills of attainder and confiscation, still the great purpose of emancipation is made manifest throughout. Emancipation as a punishment seems to be uniform, whatever may be the difference of punishment in other respects. That the



emancipation was designed to take effect immediately after the expiration of sixty days from the President's proclamation to the rebels to lay down their arms, seems clear from the act itself. And the sixth section contains a provision, that, "all slaves of such persons [persons engaged in rebellion] found or being within any place occupied by rebel forces, and afterwards occupied by the forces of the United States, shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves." Each of the seceding States is a "place occupied by rebel forces." And we trust that every such place will yet be "occupied by the forces of the United States." Is the provision designed to make all the slaves in such "places" free, as captives of war, without trial or judgment? We ask for information.

We are admonished by our limits that we cannot discuss the construction of this act at large. There are two or three propositions which we place before our readers for their consideration.

1. Slavery is not the cause of the rebellion \* in the sense in which the emancipationists use that phraseology. Slavery is the pretext on which the leaders of the rebellion rely "to fire the Southern heart," and through which the greatest degree of unanimity can be produced. It is a subject upon which the slaveholders, and many at the South who are not so, are exceedingly sensitive. Mr. Calhoun, after finding that the South could not be brought into sufficient unanimity by a clamor about the tariff, selected slavery as the better subject for agitation. And the ultra abolitionists have not failed to supply sufficient fuel to keep the matter at a white heat. All these projects for immediate emancipation at the present time are direct aids to the rebellion.

It is the inordinate political ambition of the Southern poli-

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\* A recent report in the Legislature of Kentucky takes the same view.

ticians which is the cause of the rebellion,—slavery being only a remote agency, as it fosters and develops that ambition, and furnishes it with a subject for agitation; just as the personal ambition of some of the most prominent antislavery men of the North is the cause of their zeal for abolition, their love for the negro and for human freedom being assumed as the best subject on which to agitate themselves into public office. If the nullification of 1832 had become an active rebellion, the tariff would not have been the cause of the war, but only the pretext for it.

2. There can be no confiscation for treason, consistently with the Constitution, without a trial and conviction.\*

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\* The writer in the Boston Courier who assailed the North American Review in general, and the article on Habeas Corpus and Martial Law in our number for October, 1861, in particular, and whom, in a note to the article on Constitutional Law in our number for April last, we charged with gross misrepresentations of our positions, proving our charge by extracts, has not, so far as we are aware, made any response to that charge, either by way of denial or admission; but "G. T. C.," *who for aught we know may be the same personage*, and to whom we paid our respects in a note on Confiscation, appended to the same article, was stirred up to a reply. As we have the subject of Confiscation again under consideration, we will bestow a brief notice upon it. We are particularly induced to do so by this paragraph contained in it:—

"In the view of the North American, the Constitution has provided that you cannot forfeit more than a life estate in lands by a verdict *and* judgment, but you may forfeit all personalty by a verdict alone, which may be set aside by the court the next day as unwarranted by the law and the evidence. The defendant is then tried again, and acquitted. He is innocent;—but his personal property is forfeited, and gone. He is punished before he is ascertained to be guilty; and when the investigation is completed in accordance with the rules of law, he is found to be innocent when the punishment was inflicted."—*Boston Courier*, April 12, 1862.

Now the North American has suggested no such view, nor enunciated any proposition which in the most remote degree countenances such a conclusion. Did it not occur to G. T. C., when he penned that paragraph, that at the common law there was no practice by which a verdict could be set aside and a new trial granted in cases of treason and felony, and that there was, therefore, at the common law, no opportunity for the preposterous consequence which he suggests as the view of the North American, to wit, that there might be a verdict of guilty, and thereupon a for-

### 3. A provision that slaves who have taken no part in the war shall be deemed captives of war, and free upon the occu-

feiture of the personal property, and then the verdict be set aside and an acquittal be had upon a new trial, but the forfeiture remain complete and effective ?

" In case of felony or treason, it seems to be completely settled, that no *new trial* can, in any case, be granted ; but if the conviction appear to the judge to be improper, he may respite the execution to enable the defendant to apply for a pardon." — 1 Chitty's Criminal Law, 654. See 6 Durn. & East, 625, 638 ; 13 East, 416, note *b*, and other authorities.

It is true, that it was early settled that a new trial may be granted in an indictment for treason, in the United States. 3 Dallas, 515, *United States vs. Fries*. But under the practice here, of setting aside verdicts in capital cases and granting new trials, no such consequence as that stated by G. T. C. could follow, because when the verdict is set aside the case stands as if it had never been rendered.

" A new trial is a rehearing of the cause, before another jury ; but with as little prejudice to either party as if it had never been heard before." — 3 Black. 391.

And this is equally true of criminal as of civil cases. Was G. T. C. ignorant of all this, or is the paragraph which we have cited above only another instance of his way of putting things ? The verdict is set aside because there has been no rightful trial, and so no rightful conviction, and the necessary result is, that there could be no rightful forfeiture arising from such verdict. All the incidents attached to it have gone with it. But there may afterwards be another verdict and conviction, which might operate as a forfeiture if the old common law rules were in force ; or there may be an acquittal, which will leave the matter as if there had been an acquittal in the first instance. The foregoing extract, however, is a pretty fair specimen of G. T. C.'s mode of argument.

We pass now to the main question, to wit, whether the Constitution limits the power of Congress in relation to the forfeiture of personal estate, as a punishment for treason, so that the title to his personal estate cannot be taken away for any longer period than during the life of the traitor, leaving a remainder or reversion in such personal estate to fall to his executors, or administrators, — which was the doctrine originally maintained by G. T. C., and applied by him particularly to a forfeiture of slaves, who, he admits, are personal, and not real property. We conceded that the Constitution limited the forfeiture of real property to an estate for life, and pointed out the distinction between the forfeiture of goods and chattels — which by the common law occurred upon the conviction of the offender, and related to the time of the conviction, respecting which the Constitution is silent — and that of real estate, the forfeiture of which by the common law arose from the judgment and attainder relating back to the commission of the offence, and which the Constitution refers to and limits, so that Congress cannot constitutionally punish treason by a forfeiture of real estate for any longer term than the life of the traitor, be that term greater or less.

pation of the place where they are found by the forces of the United States, (by reason of the rebellion of their masters,

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We copied several passages from Blackstone, to show that the forfeiture of personal property arose upon conviction before judgment. G. T. C. says, that Blackstone, "although a most elegant, was not always the most accurate of writers," and says, that he "has made a very imperfect statement of the common law on this subject."

Now let us see what Coke says: —

"If a felon be convicted by verdict, confession, or recreancie, he doth forfeit his goods and chattels, &c. presently. For where a reason hath beene yeelded in our bookes, that the praying of his clergie was a refusall of the law, and for that cause he forfeited his goods and chattels, that doth not hold; for if a man be convict of pettie treason, or murder, or any other crime for which he cannot have his clergie, yet by the verie conviction he forfeiteth his goods and chattels before attainder. And *Stanford* (speaking of a felon convict by verdict) saith that he shall forfeit his goods which he had at the time of the verdict given, which is the conviction in that case," &c. "So as by a conviction of a felon, his goods and chattels are forfeited; but by attainder that is by judgment given, his lands and tenements are forfeited, and his blood corrupted, and not before." — Co. Lit. 391, a.

It may very well be true that the king could not seize the goods to the use of the crown, nor grant them away to any applicant until after judgment. This is perfectly consistent with the fact that they were forfeited. It was the just policy of the same law which caused the forfeiture to occur upon conviction, to permit the goods to be applied to the support of the traitor and his family, and to the payment of his debts, notwithstanding the forfeiture. (*Considerations on the Law of Forfeiture in High Treason*, 81, 82.) And this shows the reason why the king could not seize the goods, nor grant them to another, in the intermediate time between the conviction and the judgment. It would seem from some of the older authorities that the goods might be inventoried, and security taken, after indictment, and prior to the conviction. (See 2 *Hawkins*, P. C., ch. 49.) It is said to be the better opinion that the party might take the mean profits of his land up to the judgment, although the forfeiture related back to the time of the offence. (*Ibid.*, sec. 32.)

We submit that there is nothing in the authorities cited by G. T. C. which conflicts with these views; and it is quite evident that his labored argument to show that the forfeiture of goods and chattels is "*worked*" by the attainder has no sound foundation.

It will be noted that we have nowhere contended that there is in this country any forfeiture arising from conviction.

There is another matter to show the true construction of the Constitution. G. T. C. says: "If the Reviewer had a clause which read, 'No attainder of treason shall work forfeiture of real estate, except during the life of the person attainted,' he would have a better ground from which to criticise my construction. Even then, however, he would find it difficult to discover why the framers of the instrument should have assumed that an 'attainder' had nothing to do with personalty." And

but without any trial of the question of rebellion,) is but another mode of enacting emancipation, the captivity being figurative, and the emancipation being the reality. It looks very much like a bill of attainder by Congress, which is forbidden by the Constitution, and there is the further objection to it, that it does not appear on whom it is going to operate, until its operation is practically perfected.\*

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with reference to our remark, that "a forfeiture of a life estate in personal property, of which the traitor had the absolute title, would certainly be an anomaly," he says: "It is not denied that they limited the forfeiture of real property to an estate for the life of the traitor. Is that not as much of an anomaly, in reference to the old common law, with all its searches into every possible interest in land, as the forfeiture of a life interest in personalty?" We answer, that it is not. But suppose it were so, what has that to do with the argument? If we have no clause of the Constitution which reads, "No attainder of treason shall work forfeiture of real estate, except," &c., we have the fact that such was the law of England prior to the adoption of the Constitution, and the framers of it undoubtedly had reference to the change which had been made in the law there. The "old common law" was altered by the Statute of 7th of Anne, ch. 21, which contained a proviso that, after the decease of the Pretender, &c., "no attainder for treason shall extend to the disinheriting of an heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders during his, her, or their natural lives only; and it shall and may be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained if no such attainder had been, to enter into the same." (See 2 Hawk. P. C., ch. 49, sec. 52.) Was G. T. C. not aware of this statute, or was his reference to the "old common law" in connection with the Constitution, instead of a reference to this statute, another instance of his peculiar mode of discussion? It may well be assumed, we think, that this provision of the Statute of Anne was the foundation of the clause which was inserted in the Constitution, in fewer words, but with the same meaning. And thus there is not only no anomaly, but a perfect accordance, between the constitutional provision and the law of England as it was in force after the Statute of Anne.

We suggest to G. T. C. that, the next time he takes occasion to controvert the positions of the North American, it may be well for him to state them and their consequences fairly, and without any attempt to get up an argument founded on a misrepresentation, either express or implied; and we commend this matter to his particular consideration.

\* Mr. T. D. Elliot, a Representative in Congress, who made a speech, September 9, at Worcester, the evening before what has been called "the Republican Convention" was held at that place, is thus reported: — "'After the war,' said he, 'there

All the accounts from the army uniformly represent that the soldiers who have thus far fought our battles have neither part nor lot in these projects for universal emancipation. "Let it once be understood," said an educated and intelligent colonel of a regiment which had seen hard service, "let it once be understood that this is a war for the emancipation of the negro, instead of a war in defence of the Constitution, and three quarters of the army would lay down their arms." It is those who stay at home and make impassioned speeches about liberty for the slave, and those who sit and listen and shout, but do not fight, that seek to make emancipation the object of the war. They have two ideas among them. Some, and the greater portion, of those who shout are philanthropists, part of them by profession, a majority by the genuine kindness of their hearts. These have not the faculty of reason strong enough to enable them to consider and judge into what a gulf of perdition any breach of the Constitution by the North at this time may plunge us ; nor the caution which counsels not to give up a certain good for an uncertainty. They forget the eloquent peroration of Mr. Webster, in his speech on Nullification. Their idea is emancipation for the sake of emancipation, and some of them would prefer that the Union should be dissolved if slavery cannot be abolished. Another portion of them, consisting of the speech-makers in general, and their body-guard, are striving to avail themselves of the philanthropy of the portion first named, by securing its support for all the various offices of which they are among the most diligent seekers under the face of the heavens. Their idea is office,

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can be no *status ante bellum*.' Mr. Elliot was sure that the time would come when we, joining hands with the Democrats, should demand freedom for the slave, and service for the freedman." — *Boston Daily Advertiser*, September 10.

It may therefore be supposed that this is to be the watchword. The meaning, if we understand it, is that the slave shall be emancipated by compulsion, and then the master required to hire him.

office, office. It would seem as if many of them would give up their chance of heaven for an office ; and perhaps, humanly speaking, the bargain might be regarded as a good one. In senate-chambers and on stumps, in pulpits and at picnics, in camp-meetings and at commencements, "the everlasting negro" is supposed to be the best bid for the votes of those whose hearts are better than their heads, who act as if slavery were the only form of oppression on earth, and who place no great estimate on the blessings of a free government, in comparison with emancipation, because after emancipation is once effected we shall have reached their millennium.

The question which is presented by the leaders of this party, at the present time, is whether we are ready to usurp a power not conferred by the Constitution of the United States, violate all the oaths which we have taken to support it, make this a war upon State rights, destroy a portion of the sovereignty of the States, which they unquestionably possessed upon the declaration of independence and the treaty of peace with Great Britain, and have never parted with, and thereby break up the union of the States under the Constitution. To this we unhesitatingly answer, No, a thousand times, No. This would be a revolution on the part of the North, and we are satisfied that an attempt to conduct the war on this basis must result in the final acknowledgment of the independence of the seceding States.

We desire not to be misunderstood, and we shall be glad not to be misrepresented. Our opposition to slavery knows none but constitutional and prudential limits. We have labored with all our powers for the restriction of slavery in the Territories, which we have no doubt is constitutional, the opinion of half a dozen judges of the Supreme Court to the contrary notwithstanding, and we should most heartily rejoice if some mode could be devised for the extinction of slavery in the States, without entailing upon the country worse evils. But

we denounce with unqualified condemnation the philanthropy, or the treason, call it which you please, that would violate the Constitution of the United States, and subvert the constitutions even of the seceding States, and thereby destroy the union of the States, and the hopes of constitutional liberty for the white race, in order to give freedom at once to four millions of slaves, seven eighths of whom would not know how to use it when they had obtained it, and who must suffer incomparably greater hardships, under existing circumstances, from such a gift, if it could be conferred on them by a Presidential proclamation, than they have thus far by the servitude to which they are subjected, which is unquestionably bad enough. If this insane persistence in the call for emancipation, either by proclamation or by confiscation first and trial afterward, shall result in divided counsels and divided effort at the North, and thereupon the rebellion shall by any possibility be successful, we do not propose to be numbered among those upon whose miserable heads the storm of popular indignation will fall, rightfully and pitilessly, and perhaps to a bitter end.

If the Union of the States is dissolved, the non-slaveholding States may possibly for a time remain united under one government. But we have no assurance that the free navigation of the Mississippi might not, at no distant day, induce the Western States to join the Southern Confederacy. Their material interests would in that case to some extent be advantaged thereby. It has already been held out as a lure to them to desist from their opposition.

In conclusion, we would say that we are in favor of the prosecution of the war with the greatest possible vigor. It has been forced upon the North, as we have shown, under circumstances of the most atrocious character. We could not refuse to fight without dishonor. We cannot fail of victory without subjugation. The rebel Provost Marshal of Frederick



is careering through the streets, with the flag of the United States tied to his stirrup and trailing in the dust. Shall we not fight? Those who cannot appreciate fighting for the honor of our flag, for the success of republican institutions, for the cause of freedom, and the hopes of the world, may perhaps understand, from what we have stated, that a peace which should give the rebels the control of the Mississippi would render the Free States tributary to the Southern Confederacy. It is idle to talk about a treaty for the free navigation of the river, or a declaration making it an open sea. To persons who cast aside all their constitutional obligations, and disregard their most solemn official oaths, the stipulations of a treaty would impose as little restraint as the meshes of a cobweb; and whenever passion or interest should require it, the banks of the river would again bristle with batteries, for the destruction of Northwestern commerce.

We are in favor of the organization and arming of negro regiments and brigades, if the time has come when they can be made available without detriment to the public service. The Confederates would not hesitate to do the same, if they could trust the negroes. Slaves are property, and the rebels do not hesitate to use any of our property, when it falls in their way, against us. Ah! but when we suggest this, slaves immediately become persons, and very dangerous persons. Well, we hope we shall not disturb the sensitive nerves of our Transatlantic cousins (who blow rebels from the mouths of their cannon, and whine hypocritically about the sinking in Charleston harbor of a few old vessels loaded with stone, as an outrage on civilization) when we say, that, if it becomes necessary, for the suppression of the rebellion, we are in favor of placing arms in the hands of these persons, and letting them fight in their own parties, and under their own leadership. That will be a proclamation for freedom of a practical character. It may be fast coming to this. European sympa-

thizers with the rebellion may as well prepare their hartshorn. Great Britain armed the Indians against us in the Revolution, and in the war of 1812. It is, we suppose, one of those things which, according to the London Times, she does not intend to do again — until she finds an opportunity. The South have armed the Indians against us in this war, as others besides Mr. Albert Pike can testify. All over the South and Southwest, men have formed themselves into guerilla bands, which murder, destroy, burn, and pillage. And we do not perceive the essential difference between black and white guerillas. It may be that the slaves thus armed will commit some atrocities. We shall regret it. But we repeat, This war has been forced upon us. We have sent to the field our bravest and our best. The idols of happy homes have fallen by hardship, disease, and battle, and deep anguish has come to many a Northern household. We know no reason why we should be more tender of the she-dragons of the South, who have been so loud-mouthed in the cry for secession and war, than we are of the best and dearest of our sons, who are marching under an intolerable heat and falling by the wayside, tenanted loathsome Southern prisons, dying of the fever of the camp, mangled by the missiles of war, not only in open conflict, but from the stealthy ambushade of the Southern guerilla, and lying for days uncared for on an unfortunate battle-field of which we did not retain the possession. We hesitate not to say, that it will be better, immeasurably better, that the rebellion should be crushed, even with the incidental consequences attendant on a servile insurrection, than that the hopes of the world in the capacity of mankind to maintain free institutions should expire with American liberty.

Whatever of emancipation comes by the most vigorous prosecution of the war will come without any violation of constitutional obligations, and without any revolutionary measures on our part; and we do not object to it. We are

persuaded that there will be quite as much of it as the country can provide for, and this without any necessity for the reconstruction of our institutions, which it is idle to suppose can be done in a peaceable manner. The constitutional free government founded by our fathers has been transmitted to us as a priceless inheritance, and with God's help we intend to maintain it, that it may descend to our children.









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INTERNATIONAL LAW.

CASE OF THE TRENT.

Capture and Surrender of Mason and Slidell.

BY JOEL PARKER.

CAMBRIDGE:  
WELCH, BIGELOW, AND COMPANY,  
PRINTERS TO THE UNIVERSITY.  
1862.





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**MEMORANDUM.** — The following Article, intended for the April number of the North American Review, but not finished in season, was completed in that month, and printed for the next number. This will serve to explain why certain matters appear in notes which, if it had been written at a later date, might have found a place in the text, and why its appearance in its present form is delayed until July.

The substance of the legal argument, on the facts then existing, was stated in a Lecture delivered to the students in the Law School of Harvard College, in the course of the author's duties as Royall Professor of Law, January 17, 1862.

CAMBRIDGE, *May* 1, 1862.

## INTERNATIONAL LAW.

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1. *Correspondence relative to the Case of Messrs. Mason and Slidell.* Pub. Doc.
2. *Papers relating to Foreign Affairs, accompanying the President's Message to Congress at the Opening of its Session in December, 1861.* Pub. Doc.
3. *Speech of SENATOR SUMNER, delivered in the Senate, January 9, 1862.* Washington, D. C. : Scammell & Co.
4. *The Trent Affair. The remaining Despatches.* Boston Daily Journal, January, 1862.
5. *Additional Despatches on the Trent Case.* Boston Daily Journal, February 12, 1862.
6. *Opinion of M. D'HAUTEFEUILLE.* New York Times, January 4, 1862.

THE affair of the Trent is settled so far as immediate results are involved. Messrs. Mason and Slidell have been delivered up to Lord Lyons, and have reached their destination by the way of St. Thomas and Southampton. There has been no war with Great Britain, no humiliating surrender, no apology, no ovation, nor any great manifestations of rejoicing among the people of England. The most unkind cut of all is the declaration of the London Times that Great Britain would have done as much for two negroes; as she might have done with much more propriety if the United

States had made a seizure on board the Trent of that description.

In the mean time no principles of international law have been settled in relation to the rights of belligerents and neutrals. The demand is couched in the most general terms, ignoring all the particular circumstances upon which the seizure was made, and which were supposed by Captain Wilkes to justify it. It is acceded to with a substantial declaration that the act was justifiable but for the neglect to bring the vessel in for adjudication; and the surrender is made on account of this omission, or because the United States long ago contended for certain doctrines in relation to neutral rights, which Great Britain strenuously resisted, but which she is supposed to sustain by this demand; — it does not appear to be quite certain upon which ground it is placed. At the same time it is declared, that, if the safety of the Union required the detention of the captured persons, it would be the right and duty of the government to detain them; but the effectual check and waning proportions of the existing insurrection, as well as the comparative unimportance of the captured persons themselves, happily forbid a resort to that defence.

Earl Russell replies to this, that the neglect to send in the Trent was by no means the sole ground of the demand; he does not admit that Great Britain has abandoned any of her ancient doctrines, and he informs Mr. Seward "that Great Britain could not have submitted to the perpetration of that wrong, however flourishing might have been the insurrection in the South, and however important the persons captured might have been."

How far this assertion of the Secretary of State may be considered as an admission that Great Britain was justifiable or excusable in her claim of a right to impress her seamen when found on board of our vessels, a claim which it was attempted to sustain by the plea of necessity, and which, how-

ever shaken, has never been formally abandoned ; and a further admission that the adoption of the act of McNab, in invading our territory and burning the steamer *Caroline*, (which also it was attempted to justify by this same necessity, and which has never been atoned for,) has a like justification or excuse ; and how far, on the other hand, Earl Russell's reply, that Great Britain would not have admitted the safety of the Union to be an excuse for the capture and detention, however flourishing might have been the insurrection in the South, may be regarded as a concession on his part that Great Britain was entirely wrong when she alleged necessity as a plea for impressment in the one case, and for the violation of neutral territory and the burning of the steamer in the other, — are matters which remain for diplomatic discussion whenever some new transaction shall require it.

As the diplomatic correspondence has been of no avail to settle any principles of international law, but has rather left confusion worse confounded, we propose to follow the discussion of those principles somewhat further. Neither the correspondence nor subsequent reflection upon the subject has at all shaken our confidence in the opinions which we expressed in the article in our number for January, upon "The Foreign and Domestic Relations of the United States."

For the right understanding of the subject, we inquire, in the first place, What is to be understood by international law, and from what sources is it derived ?

International law has been defined by Mr. Wildman to be "the customary law which determines the rights and regulates the intercourse of independent states in peace and war." Sir William Scott (3 Rob. Ad. Reports, 326) remarks, that it was a law "made up of a good deal of complex reasoning, though derived from very simple rules, and altogether composing a pretty artificial system." The British government have said that it is "founded upon justice, equity, conven-

ience, and the reason of the thing, and confirmed by long usage." See 1 Phill. Int. Law, [15] 55. Dr. Phillimore states that

"*Analogy* has great influence in the decision of international as well as municipal tribunals; that is to say, the application of the principle of a rule which has been adopted in certain former cases to govern others yet undetermined." — 1 *Int. Law*, [35] 68.

The sources of international law, as set forth by the very learned jurist last cited, are the Divine law natural and revealed, reason, and the consent of nations. He says: —

"The obligations of natural and revealed law exist independently of the consent of men or nations, and although the latter acknowledge no superior upon *earth*, they nevertheless owe obedience to the laws which they have agreed to prescribe to themselves, as the rules of their intercourse in peace and war. . . . This consent is expressed in two ways: 1. It is openly expressed by being embodied in positive conventions or treaties. 2. It is tacitly expressed by long usage, practice, custom." — *Ibid.*, [37] 69.

Speaking of the repositories and evidences of the consent of nations, the same author enumerates history, the contents of treaties, proclamations or manifestoes issued by the governments of states to the subjects of them upon the breaking out of war; and he says of the latter, "These public documents furnish, at all events, decisive evidence against any state which afterwards departs from the principles which it has thus deliberately and solemnly invoked." (*Ibid.*, [50] 78.) He adduces the decisions of prize courts, and of the tribunals of international law, as an evidence of the consent of nations, and in that connection takes occasion to refer to the judgments of Lord Stowell (Sir William Scott), and to the strong commendations bestowed upon them by Chancellor Kent and Dr. Story, quoting the language of the latter as follows: —

“How few have read with becoming reverence and zeal the decisions of that splendid jurist, — the ornament, I will not say, of his own age or country, but of all ages and all countries; the intrepid supporter equally of belligerent and neutral rights; the pure and spotless magistrate of nations, who has administered the dictates of universal jurisprudence with so much dignity and discretion in the prize and instance courts of England! — Need I pronounce the name of Sir William Scott?” — *Ibid.*, [57] 82.

The author adds, also, the concurrent testimony of great writers upon international jurisprudence as another evidence of the consent of nations, for which he cites Wheaton on International Law.

From this examination of the general character, sources, and evidence of international law, it is quite apparent that in many instances the rules which must determine the rights, and which should govern the intercourse, of two nations, may be applicable to those nations alone, while in other cases the rights may be dependent upon principles of a more enlarged application, and the intercourse be regulated by usages which have the evidence of a much more general consent.

It hardly needs an argument to show that the questions arising in this case of the Trent are to be considered and determined as questions wholly between the United States and Great Britain, and upon the principles and usages which have been promulgated, sanctioned, acknowledged, and claimed as suitable and proper principles to determine the rights and to regulate the intercourse of those two nations; and not, mainly, by any principles which are of general authority and application throughout Christendom.

Clearly the questions at issue cannot be determined by any principles of natural or revealed law. The rights of war, and the proper mode of carrying on a war, so far as coercion by force, gunpowder, shot, and shell are concerned, are generally regulated (if regulated) by the usages of mankind, rather



than by natural or revealed religion, or even by treaty stipulations. This must almost necessarily be the case, each occasion for hostilities depending upon the peculiar circumstances attending the offence which gives rise to them, and the modes by which the hostilities may be rendered most effective. The general object of offensive warfare is to do injury to the enemy, and thereby compel him to submit to what is required of him.

Even the general laws of war may not suffice to determine the rights of the belligerent and of the neutral in this case, because the general principles regulating war do not reach the special circumstances of the case, as one arising between the United States and Great Britain. Not that there is any treaty stipulation between the two countries which determines their respective rights in reference to this matter. No treaty stipulation exists. Great Britain expressly refused to accede to certain principles which the United States desired to incorporate into a treaty, and which, if incorporated, might have had an essential bearing upon some of the questions involved in this case.

For this very reason, however, no treaty stipulation between the United States and any other nation can be regarded as governing this case, or even as having a legitimate bearing on the questions arising in it. Mr. Sumner, in the speech the title of which we have placed at the head of this article, has, with a great, and for the purposes of this case useless diligence, made a collection of the varying expressions of our treaty stipulations with other powers. But the most which these treaties can serve to show is, either that the principles of international law in relation to the subject-matter were unsettled, and that the parties to the treaty desired to have them made certain, in accordance with what they deemed to be the true principle; or that by the rules of law, as generally received, the right or usage was otherwise than as settled by the

treaty stipulation, and that the parties to the treaty were desirous of having the matter placed upon a different, and, as they deemed it, a better basis. In either view, the treaties furnish no argument whatever against the positions assumed by Captain Wilkes. On the latter supposition, the treaties, so far from furnishing an argument against his proceedings, would, as between the United States and Great Britain, furnish very conclusive evidence in his favor.

So in relation to the intervention of France, and other powers of Europe, by the expression of their hopes that the United States would accede to the demand of Great Britain; and in reference also to M. Thouvenel's suggestion, that the seizure was erroneous, and that the United States would be in the wrong if they insisted upon holding the prisoners. The intervention was valuable as an evidence of courtesy and friendly relations between those powers and the United States, shown by the expression of their desire that we should not enter into a conflict with Great Britain in which they could not sustain our right on their principles. But unless it may be shown that their principles are those upon which Great Britain has acted toward the United States, or at least that they are the principles which at the time were the governing principles as between the United States and Great Britain, those interventions and representations can have no tendency to show the right or the wrong, as between the parties to the matter at issue.

This is made especially apparent by the despatch from M. Thouvenel to M. Mercier, which was read to Mr. Secretary Seward, in which M. Thouvenel argues the question upon the rules of law as they are held by France, and upon the stipulations of the treaties between the United States and France; whereas the principles maintained by France in relation to neutral rights are not acknowledged by Great Britain, and the United States have no treaty with her of the same character, in this respect, as they have with France.

So, again, in relation to the writings of foreign publicists. Although undoubtedly such writings are evidence of the principles of international law, the evidence may be limited to the usages and customs of some nations, and not of others. Such writings cannot avail as evidence in this case, unless they recognize the principles asserted by Great Britain, and assented to or acquiesced in by the United States. This is particularly true of M. Hautefeuille, who has made himself somewhat impertinently busy in reference not so much to the principles which govern the case, as in denunciation and vituperation of the United States. He disagrees with Wheaton, and rejects entirely the authority of Lord Stowell, whose character as a jurist has not only received, as we have seen, very strong commendation in this country, but the most of whose decisions were regarded as authoritative expositions of the rights of belligerents against neutrals long before M. Hautefeuille was even heard of here. It is certainly something more than modest assurance when M. Hautefeuille, ignoring the authority of a judge who has decreed the confiscation of millions, perhaps, of American property, for violation of neutrality, and to whose decrees and judgments the sufferers and the government submitted, if not without a murmur, at least without a resort to arms for that cause,—ignoring also the fact that American publicists had lauded his great learning and eminent character, recognized his authority, and promulgated his principles as the governing, if not the best, principles of international law,—presumes to denounce the proceedings of Captain Wilkes, and to censure the United States because they have not conducted in relation to an English vessel according to his standard in regard to neutral rights.

It is perhaps not necessary to our present purpose, but we take occasion to say, that, upon any open question, not settled by agreement or consent between the two nations, but upon which each has maintained an opinion adverse to that of the

other, either has the right, at any time, to act upon the principle contended for by the other, and thus to express an assent to it, if there has not previously been something to show a withdrawal. This is the usual mode by which assent is given by implication, and in relation to such subjects it is sufficient if the assent is expressed when the occasion arises for it.

We proceed to inquire into certain principles of international law as held by Great Britain, and as recognized by the United States, their judicial tribunals and jurists, which may apply directly, or by analogy, to the case of the Trent.

The convenience or necessity of a belligerent has sometimes led to the violation of neutral territory, as in the case of the burning of the steamer *Caroline* within the limits of the State of New York; and the power of the belligerent has occasionally been sufficient to resist a claim for redress. In other words, the party committing the wrong, in the language which the London Times lately applied to Great Britain, has "fought it through," instead of doing justice. But such a course does not settle the principles which are applicable to future cases.

The main difficulties in determining the rights of the belligerent and the neutral have arisen in relation to the vessels of the latter navigating the open sea, which is the highway of all nations. It has been asserted by some, that a vessel on the ocean is to be regarded as a part of the territory of the government to which she belongs; but this position cannot be maintained, either in the nature of the thing, or according to the received rules of law. If there is any similarity between the two, it is only of a limited character. The term territory is sometimes applied to a vessel with the meaning merely that she is under the jurisdiction and laws of the nation to which she belongs, but with no intention to assert an immunity from search and seizure of the ship for violation of neu-

trality. Such was evidently the use of the term by Mr. Webster in his negotiation with Lord Ashburton. The belligerent and the neutral are alike entitled to pass and repass upon the ocean, and there is no *territory* there. The belligerent has the right to carry on his hostilities against his enemy wherever he can find him on the high seas, and the neutral character of a vessel there cannot be known except upon inquiry, for which purpose visit is allowed;—whereas neutral territory manifests itself, is known, and is to be respected without visit, search, or inquiry, except upon evidence of a violation of neutrality.

In an article on the affair of the Trent, in the February number of the London Law Magazine and Law Review,—the tone and temper of which are in marked contrast with the frothy and malignant issues of Blackwood, the Edinburgh, the North British, and even of the *Christian Observer*,\*—it is stated that, in a paper upon the subject read by Mr. C. Clark before the Juridical Society, he maintained as a first proposition, “that a ship is, as a rule, part of the soil of the country to which it belongs.” In a subsequent part of the paper he said that the rule that each nation claims jurisdiction over its own vessels at sea depends on the principle that every

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\* The January number of the *Observer* betrays its ignorance of American affairs by speaking of “Lord Lyons, the British Ambassador at *New York*,” and airs its vocabulary by a liberal utterance about “preposterous arrogance,” “ridiculous pride,” “national vanity,” “arrogance and bluster,” “contemptuous disregard of the rights of other nations,” &c., &c., and cloaks all this vituperation of the United States under a sanctimonious assumption of the right of Christian rebuke.

Commenting on the affair of the Trent, the *Observer* speaks of “a display of violence towards Miss Slidell, which might have, and probably would have, terminated in bloodshed, but for the heroic conduct of the English commander, who threw himself between her and the bayonets of the marines.” *Quære*, on which side was the danger of bloodshed? If Commander Williams’s story about Miss Slidell’s conduct toward Lieutenant Fairfax were entitled to any credence, it would seem that the danger was on the part of the marines, and that they must have presented their bayonets (if presented) in self-defence.

vessel is part of the state to which it belongs; and he adds: "This principle I am prepared to maintain, and must do so, for it will become of much importance in a future stage of this discussion." But he certainly does not succeed in obviating the objections of Mr. Manning to that doctrine, in his Commentaries on the Law of Nations, which Mr. Clark cites and attempts to controvert; and assuredly it is no more necessary, in order to substantiate a claim to jurisdiction over a vessel at sea, to maintain that it is part of the soil, or even a part of the state claiming jurisdiction, than it is necessary, in order to show a title to a carriage running upon the highway, and a right to govern its motions, to show that the carriage is part of the real estate of the claimant.

Mr. Manning says: "Now, no nation has jurisdiction over the territory of another nation. But as soon as a merchant-ship comes into the harbor of a state to which she does not belong, she becomes subject to the jurisdiction of this latter state. This shows that a merchant-ship cannot be considered part of the territory of her state; for if she possesses this character at any time, she must possess it at all times." (p. 210.) This alone would seem to be conclusive of the argument, without reference to the other cogent reasons offered by Mr. Manning in support of his objection to the doctrine. How is it that the character of the ship in this respect can change upon her entrance into the port of another nation, so that the part of the soil, or part of the state, which she constituted, has become detached from the state to which she belongs, but is annexed again the moment she gets out of the port? If the right of jurisdiction proves the ship to be part of the soil or state, it would seem to show that, upon entering the port of another nation, she had become part of the soil or state there. The proposition, therefore, proves too much. Mr. Clark admits that his rule is subject to certain exceptions, but in fact it is *all exceptions*. There is no particular in which the vessel

can, with any just reason, be regarded as part of the territory. The proposition is, at best, but a mere fiction, for the purpose of asserting a jurisdiction over the ship while on the high seas, and a very unnecessary fiction for that purpose.\*

There has been much less difference of opinion respecting the rights of belligerents, as against each other, than has existed in relation to their rights, as their warlike operations may affect, directly or indirectly, those nations which, having no interest in the contest, not only desire to remain neutral, but to avail themselves of all the advantages of trade and commercial intercourse to which, but for the hostilities, they would be entitled with each of the belligerents.

The neutral nationality of a vessel being established, there is still no assurance of the observance of the actual neutrality which is incumbent on those who control the ship. The "greedy merchants who care not how things go, provided

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\* In a recent debate in the House of Commons on a resolution offered by Mr. Horsfall, "That the present state of International Maritime Law, as affecting the rights of belligerents and neutrals, is ill-defined and unsatisfactory, and calls for the early attention of Her Majesty's government," Lord Palmerston said: "We have lately maintained, at the risk of war, that a merchant-ship at sea is a part of our territory, that that territory cannot be violated with impunity, that, therefore, *individuals cannot be taken out of a merchantman belonging to a neutral country.* The same principle may be said to apply to goods as well as men, and if it be granted, *as we do grant, that a belligerent has no right to take out of a neutral ship persons who are enemies,* so also it follows that the neutral must always be respected, and in the case even of enemy's property on board ought not to be violated." — If this is what was maintained, and is admitted, Earl Russell might have spared himself the labor of the greater portion of his despatch in reply to Mr. Seward, upon which we have commented at large in a subsequent part of this article. It is beyond question that *there is no contraband of war within a neutral territory, nor any right to capture enemies of any sort within such territory, unless they use it for the purposes of active and immediate hostilities against the belligerent.* And it is equally clear that the enemy's despatches, when within neutral territory, are not subject to capture. The whole matter in controversy would be ended at once on such a principle; and we need not talk about, what would be an idle, as well as a ridiculous question, to wit, whether a *journey of neutral territory from one neutral port to another neutral port* would vary the rights of the parties.

they can satisfy their thirst of gain," pay little regard to proclamations of strict neutrality, so long as large profits attend a violation of it by the transportation of contraband goods, and profits may also be derived from the carriage of goods belonging to the citizens or subjects of the belligerent nations. This has led to the admission of a right of search, not to be exercised, we think, in cases where no violation of neutrality can reasonably be supposed to exist, but to which the neutral vessel should submit without objection in all cases where it may be rightfully exercised. This search, according to the general principle as laid down by English and American writers, may be for the purpose of capturing the goods of the enemy found on board, which, if not contraband of war, may be carried without a violation of neutrality, and without subjecting the vessel to confiscation, although the goods themselves are liable to capture.\*

In the war in 1855 between Great Britain and France on the one part, and Russia on the other, Great Britain waived for the time her right to capture enemy's goods in neutral vessels, but she took good care to limit the waiver to that occasion. The language of Her Majesty's proclamation was, —

"To preserve the commerce of neutrals from all unnecessary obstruction, Her Majesty is willing, *for the present, to waive a part of the belligerent rights appertaining to her by the Law of Nations.* . . . .

"It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches; and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbors, or coasts. . . . .

"But Her Majesty *will waive the right of seizing enemy's property*

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\* This is admitted to be a general principle of international law, of very ancient date, upon which any nation may act unless restrained by treaty or agreement.



laden on board a neutral vessel, unless it be contraband of war." — 3 Phill., [294] 238.\*

Right of search may also be exercised for the capture of goods the property of the neutral, if they are contraband of war. In the absence of treaty stipulations one of the most perplexing and irritating questions has been, What shall be deemed contraband of war? The general principle is, that the

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\* In the debate in the House of Commons, March 17th, Mr. D'Israeli, referring to the second article of the Declaration at Paris, that the neutral flag covers the enemy's goods, and to the reason given by Lord Palmerston for the adoption of it, said: "I must do the noble Lord the justice to say that he did not dwell much on that point. He admitted that the real causes of the change have been placed more clearly before the House by the honorable member for Birmingham. It was because, on the eve of a war with Russia, we feared the assertion of the principle that a neutral flag does not cover the cargo might involve us in embarrassments with the United States. The noble Lord recognized the accuracy of that description."

But Dr. Phillimore, who must be good authority, gives a reason altogether different, — one which has no reference to the United States; and we certainly have no evidence that there was any notice given to the United States that Great Britain had adopted and would abide by the principle for which the latter had contended. Dr. Phillimore says: "At the breaking out of the present European war [1855], England found herself in close alliance, offensive and defensive, with France. They were to wage war together both by sea and land. It was therefore supposed to be necessary that there should be an agreement between them as to the question which has been so long under our consideration, of the exercise of belligerent rights towards neutrals. *The result was a compromise.* France abandoned her doctrine, that enemy's ships made enemy's goods; England agreed to allow, *during her alliance with France in the present war*, the doctrine that free ships made free goods. But she scrupulously and expressly declared that in so doing she '*waived a part of the belligerent rights appertaining to her by the Law of Nations.*' It will be seen, therefore, from the principles already laid down in this work, as well as from the reason of the thing, that *England has retained unimpaired her belligerent right upon this important subject.* In the communications which have passed on this subject between England and the North American United States, the Minister of the latter country observed in his reply: '*Notwithstanding the sincere gratification which Her Majesty's declaration has given to the President, it would have been enhanced if the rule alluded to had been announced as one which would be observed, not only in the present, but in every future war in which Great Britain shall be a party.*'" (3 Phill., [292] 237.) In a note he says: "In 1823 and 1826-27 vain attempts were made to adjust this question between England and the North American United States."

neutral shall not aid either belligerent in his warlike operations. The transportation of arms and munitions of war generally to a belligerent is clearly a violation of the duty of the neutral, but the list of articles regarded as contraband because of their direct or indirect assistance in the prosecution of the war has been extended greatly beyond goods necessarily of a warlike character; and so controversies have arisen respecting goods of a debatable description, the interest of the belligerent being to cut off all supplies from his enemy, and the interest of the neutral being for the largest liberty of trade and commerce. Great Britain, as a belligerent, has heretofore insisted, against the United States and other neutral nations, upon the largest catalogue of contraband goods. See the case of the *Jonge Margaretta* (1 Rob. Adm. Rep. 195), also the case of the *Zelden Rust* (6 Rob. Adm. Rep. 98), in which cheeses suitable for naval stores were held to be contraband.

As between Great Britain and the United States there is a right to capture despatches of the enemy. Great Britain has uniformly insisted upon the general principle that the carriage of the despatches of a belligerent is a violation of neutrality, and by the decisions of her Admiralty court has maintained the most stringent rule, to the extent of including as despatches "all official communications of official persons on the public affairs of the government," saying, if the papers so taken relate to public concerns, be they great or small, civil or military, the court will not split hairs and consider their relative importance. See extracts in our January number, Article X., from the case of the *Caroline* (6 Rob. Adm. Rep. 461-470), case of the *Susan* (6 Rob. 461, note), case of the *Atalanta* (6 Rob. 440-460). In the case of the *Caroline*, above cited, an exception was made, to which we shall refer hereafter.

In the war by Great Britain and France against Russia,

Great Britain, as we have seen, waived the right to capture enemy's goods, but insisted on her right to capture despatches, and American writers have recognized this as a belligerent right.

Controversies less numerous have arisen upon the question, under what circumstances the transportation of persons belonging to a belligerent party is a violation of neutrality. Here, again, Great Britain, as against the United States, has promulgated and enforced the rule limiting to the greatest extent the right of the neutral. See what is said by Sir William Scott respecting persons who were going to be employed in civil capacities in the government of Batavia (6 Rob. 434, Case of the *Orozembo*).

A vessel resisting visitation and search renders herself liable to capture and condemnation. See case of the Swedish ship *Maria*, which was under convoy of a Swedish frigate (1 Rob. 340).

That the principles thus laid down remained, up to the time of the present rebellion, as the principles of international law, recognized, and to some extent, it might be said, established by Great Britain, is shown beyond doubt by the fact that Dr. Phillimore, whose work, in four volumes, was published at different times from 1854 to 1861, states them all, with undoubting confidence, as general principles. Other English writers, so far as they have had occasion to refer to them, state them in a similar way, perhaps not so much in detail.

Against some of these doctrines the United States objected, but in vain, and finally acquiesced, so far as acquiescence is shown by a failure to follow up the objection by war, and by the general course of their judicial decisions. They have been recognized by the most eminent publicists here, and have been taught in the schools of law, so far as there has been occasion for instruction, as settled principles, — the principles of

Continental Europe, so far as they were different, not being recognized as authority, or as being at most of doubtful application.

Dr. Phillimore quotes from Kent's Commentaries, with marked approbation, the following passage: "We have a series of judicial decisions in England and in this country, in which the usages and duties of nations are explained with that depth of research and that liberal and enlarged inquiry which strengthen and embellish the conclusions of reason. They contain more intrinsic argument, more full and precise details, more accurate illustrations, and are of more authority than the loose dicta of elementary writers. When those courts in this country which are charged with the administration of international law have differed from the English adjudications, we must take the law from domestic sources; but such an alternative is rarely to be met with, and there is scarcely a decision in the English prize courts at Westminster on any general question of public right that has not received the express approbation and sanction of our national courts." (1 Kent's Com., 68; 1 Phill., [55] 81.)

It appears from the articles adopted by the Congress at Paris, in 1856, that Great Britain did not by her participation in that adoption limit her rights in relation to any of the matters involved in this case of the Trent, except so far as the right to capture enemy's goods in a neutral vessel may bear upon the case. There is no explanation or specification of the time when, or the circumstances under which, you may stop the ambassador of the enemy, or capture his officers, soldiers, or civilians on board of a neutral vessel,—no surrender of the right claimed to capture despatches,—and no settlement of the list of what shall be regarded as contraband.

It appears further from the result of the correspondence between the United States and Great Britain, in 1861, respecting the adoption of those articles by the former, that whatever

rights the United States as a belligerent would have had against Great Britain as a neutral, on the principles which governed the international relations of the two countries before the Congress at Paris, are in no manner affected by the proceedings of that Congress, notwithstanding the proposition of the United States in the first instance to become a party to those articles, with an additional clause exempting private property from capture on the high seas, and, after that was rejected, their offer to adopt the four articles "pure and simple." They may claim the right to capture enemy's goods in neutral bottoms, as they might have done before, notwithstanding the third of those articles provides for the exemption of such goods, and either of their offers of adhesion if accepted would have made them parties to the agreement that enemy's goods thus situated should be exempted.

We are aware that Mr. Seward, in his reply to the demand for the delivery of Mason and Slidell, says: —

"It has been settled by correspondence that the United States and Great Britain mutually recognized, as applicable to this local strife, these two articles of the declaration made by the Congress of Paris in 1856, namely: That the neutral or friendly flag should cover enemy's goods, not contraband of war, and that neutral goods, not contraband of war, are not liable to capture under an enemy's flag."

But how has this mutual recognition been settled? The articles of the Declaration of Paris have never been adopted by the United States. Notwithstanding, therefore, there was no objection on the part of the United States to those two articles, there was no agreement between Great Britain and the United States respecting them; and in case of a war in which Great Britain is a belligerent and the United States neutral, the former may allege that the matter was all left open, and that as to the latter she has the right of capture, which she only waived in the Russian war, and has not parted

with as against the United States by her agreement with other governments.\*

This failure to make a complete accession to the articles was not the fault of the United States, having been occasioned in the first instance by the provision that all the articles must be adopted, or none, and by the refusal of Great Britain to agree to the exemption of private property from capture, and lastly by her insisting upon adding to the agreement to adopt a declaration which would, or it was supposed might, vary their effect.†

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\* In the recent debate in Parliament already referred to, Lord Palmerston said, in regard to the second article of the Declaration at Paris "which said that the flag should cover the goods, that has always been the principle which the United States has maintained, and therefore no difficulty arises between England and the United States upon that article. It requires no additional declaration to bind them to the observance of that article, because that has always been their doctrine, and the fact that it was their doctrine led us to think that it was more prudent and wise to adopt, in common with other parties, the Declaration of Paris."

But the fact that it was the doctrine of the United States years since did not prevent Great Britain from denying it and refusing to be bound by it. How does her agreement with France and other European powers to adopt it serve to bind the United States, when it is in that declaration coupled with another article which there was no good reason to suppose the United States would agree to, and with a provision that any power which proposed to accede must, in the common phraseology, swallow the whole or none? Where is the notification to the United States that Great Britain was ready to agree to their doctrine respecting enemy's property without an additional article by which the former should agree to abolish privateering? His Lordship admitted that in case of war with the United States Great Britain could resort to privateers, notwithstanding the Declaration at Paris. — These statements of Mr. Secretary Seward and the Prime Minister, it will be seen, are by no means identical, but they may serve to show that during the remainder of "this local strife" enemy's goods in neutral vessels are not to be liable to capture. But they can hardly have a retrospective operation upon the principle which governed at the time of the capture of these *enemy persons* by Captain Wilkes.

† In a note to an article on "Belligerents and Neutrals," published in the January number of the *Edinburgh Review*, (which must have been prepared originally for the columns of the *London Times*, and have been rejected by that paper because of the hostility and injustice manifested in the article toward the United States,) it is said, "The correspondence of the American government, recently published, proves

The United States have the right to claim against Great Britain, as a neutral, all that Great Britain could claim against them, on her principles, if the circumstances were reversed, and as those principles were held by her prior to the Congress at Paris.

The right so to claim and insist is all the more clear from the fact that Great Britain voluntarily placed the United States, as respects her, in the position of a belligerent and herself as a neutral. By her recognition of the Confederates as a belligerent power, having the same rights of war as those possessed by the United States, she clearly gave the United States, as against her, all the rights of a belligerent, notwithstanding that they claimed, and still claim, that as to themselves the Confederates are rebels and traitors. Her recognition could not take away that right.

There has been too much of a disposition on the part of English writers and speakers, when the United States claim to exercise the rights of war, to respond, "Why, you do not admit there is a war; you say it is an insurrection." This would be well enough if the authority of the United States over the Confederate States were still admitted; but the answer comes with an ill grace, and without effect, from those who have invested the Confederate States with the character of a belligerent, and thus rendered it necessary that as to them the United States should have a similar character, and be entitled of course to similar rights.

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that when Mr. Adams was instructed last summer to negotiate a convention with England and France on the basis of the Declaration of Paris, this measure was adopted solely with a view to entrap the Maritime Powers of Europe into acts adverse to the seceded States."

But it appears also, from the same correspondence, that Lord John Russell, *before the subject was mentioned to him by Mr. Adams, directed Lord Lyons to make a similar proposal to Mr. Seward. Quære, was that measure adopted by his Lordship solely with the view to entrap the United States into acts for the benefit of Great Britain and other maritime powers?*

It was in this state of international law as existing between the United States and Great Britain that Mason and Slidell escaped, clandestinely, through the blockade, to Havana, thereby more securely to reach Europe. It was matter of boasting that they had done so. It was proclaimed that they were commissioned as ambassadors, but they had not, and could not have that character, or be entitled to any of its immunities, because the party that they represented was as to the United States insurrectionary and belligerent, and as to all the rest of the world, where recognized at all, a belligerent party only. Belligerents may send agents, but not ambassadors. That they had no title to be regarded as ambassadors is shown by the fact that they have had no reception or recognition as such. But they were hostile agents of the belligerent Confederacy, and themselves covered all over with the character of hostility. In fact, their agency had no other character than that of hostility. The Confederates had no diplomatic or commercial relations with any European power, and the very attempt to establish such relations was contrary to the Constitution of the United States, and of itself an act of insurrection and hostility against the United States. Herein the case is essentially different from the case of an established nation, engaged in a war, and sending its representatives abroad to continue and represent its interests as they had already been represented. In such case, an attempt by one belligerent to preserve the relations of amity already existing between itself and a neutral power has nothing of hostility to the other belligerent attached to it. The mission has of itself nothing of a hostile character. It is for the interest of the neutral, as well as for that of the belligerent, that the relations previously existing should be preserved, and, in the language of Sir William Scott, "you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility against you." But the powers of



Europe had no interest, legally or internationally speaking, in the mission of these persons. That, again, is shown by the fact of their non-reception. The Confederates alone were interested in that matter. The agents were sent to seek aid countenance, and assistance for the insurrection. That was not only the primary, but it was, in the outset, the sole motive; for until it should receive such countenance, neither diplomatic nor commercial relations could be established. The establishment of such relations would of itself give aid and support.

It may be admitted that the agents supposed that they had made their escape sure. It might probably be shown that the British Consul at Havana made some parade in speeding them on their way; and that on board the Trent there was something very like rejoicing in the honor of being common carriers to such distinguished personages.

It is under such circumstances that Captain Wilkes, cruising in the West Indies, and learning these facts, stopped the Trent, and captured the hostile officers, and the ovation which was preparing for them at Southampton is turned into an ululation, venting itself in all manner of vituperation against the United States in general, and Captain Wilkes in particular.

The part of Captain Wilkes's report material to the present discussion is as follows:—

“The question arises in my mind whether I had the right to capture the persons of these Commissioners, and whether they are amenable to capture. There was no doubt I had the right to capture a vessel with written despatches, as they are expressly referred to in all authorities subjecting the vessel to seizure and condemnation, if the captain of the vessel had knowledge of their being on board. But these gentlemen were not despatches in the literal sense, and did not seem to come under that designation, and nowhere could I find a case in point. That they were Commissioners I had ample proof from their own avowal, and that they were bent on mischievous and traitorous errands against our government.

"I then considered them as the embodiment of despatches, and it therefore became my duty to arrest their progress and capture them if they had no passports or papers from the federal government, as provided for under the law of nations, viz. that foreign ministers of a belligerent on board of neutral ships are required to possess papers from the other belligerent to permit them to pass free. As regards the Trent, the agent of the vessel, the son of the British Consul at Havana, was well aware of the character of these persons. His father had visited them and introduced them as Ministers of the Confederate States on their way to England and France. They went in the steamer with the knowledge and consent of the captain, who endeavored afterward to conceal them by refusing to exhibit the passenger-list and papers of the vessel. There can be no doubt he knew that they were carrying important despatches, and were endowed with instructions inimical to the United States."

That Captain Wilkes acted without any orders to make the capture is undoubted; that he acted in good faith, and in the exercise of what he deemed a duty to his government, is equally clear.

The capture was not for the purpose of impressment into the navy of the United States, under any claim of a right to the services of the captured party, and therefore was not like the impressments heretofore made by the British government from the vessels of the United States. It was not a capture of rebels who after defeat were seeking an asylum in a foreign land, and therefore is utterly different from some other cases which have been cited against it. It was not a capture of fugitives from justice; for the crimes of Mason and Slidell were those which of late years have been held not to come within the policy of extradition. All arguments founded upon such cases are out of place. They are not in point, nor analogous, and they present, therefore, neither a precedent nor a principle upon which to base a fair argument. The capture was expressly of hostile agents, bearers of hostile despatches,

themselves, in the language of Captain Wilkes, "the embodiment of despatches," and the main question presented is, whether a belligerent has the right to capture persons having such a hostile character, when found on the high seas in a neutral vessel, proceeding directly on their hostile errand.

It is not pretended that in making the seizure there was any damage to any material interest of Great Britain. Nothing belonging to her or her subjects was taken or injured. There has not been a suggestion that the slight delay in the voyage of the Trent worked an injury to any one. On the contrary, one of the motives which induced Captain Wilkes to forbear to capture the Trent was that such a course would occasion injury to innocent passengers; and this has been objected to as a consideration which he had no right to entertain.

It is under such well-known circumstances that the demand was made by the British government for the delivery up of the persons captured. It was made by Lord Lyons, under instructions from Earl Russell, dated November 30, in which his Lordship states that it appears from a letter of Commander Williams, agent for mails on board the contract steamer Trent, that the Trent left Havana with Her Majesty's mails, for England, having on board numerous passengers; that on the 7th inst. a steamer having the appearance of a man-of-war, but showing no colors, fired first a round shot and then a shell across the bows of the Trent; that the Trent stopped, and an officer with a large armed guard of marines boarded her; that the officer demanded a list of the passengers, which was refused, and he then said that he had orders to arrest Mason, Slidell, Eustis, and MacFarland; that the commander of the Trent and Commander Williams protested against the act of taking by force; but that the San Jacinto was at the time only two hundred yards from the Trent, her ship's company at quarters, and tompions out, resistance was therefore useless and the persons were forcibly taken out of the ship.

His Lordship then says :—

“It thus appears that certain individuals have been forcibly taken from on board a British vessel, the ship of a neutral power, while such vessel was pursuing a lawful and innocent voyage, an act of violence which was an affront to the British flag and a violation of international law.”

He professes the willingness of Her Majesty's government to believe that the United States officer was not acting in compliance with any authority from his government, or that if he conceived himself to be so authorized, he greatly misunderstood his instructions. He says that the British government cannot allow such an affront to the national honor to pass without full reparation, and Her Majesty's government trust that the government of the United States will of its own accord offer such redress as alone should satisfy the British nation, namely :—

“The liberation of the four gentlemen and their delivery to your Lordship, in order that they may again be placed under British protection, and a suitable apology for the aggression which has been committed.”

“Should these terms not be offered by Mr. Seward, you will propose them to him.”

It is true that the circumstances as detailed by Earl Russell do not serve to show that the captured confederates had any hostile mission or character. So far as it appears, on the face of the paper, they might have been most innocent and lamb-like personages, pursuing the lawful and innocent voyage spoken of in the despatch. But the facts as we have stated them respecting the true character and mission of the parties were well known in England at the time; and as the attendant circumstances, to which we shall advert hereafter, show that it was not intended to admit explanations respecting their character as a justification for their capture, we must understand that the circumstances *as we have stated them* constitute the

affront to the national honor which demanded the prompt reparation of delivering up the parties captured within the term of seven days, on penalty of the termination of the diplomatic relations between the two governments at the expiration of that time, by the withdrawal of Lord Lyons from Washington in case of a refusal, with such further consequences as might be determined upon, and which were indicated by the immediate transportation of large bodies of troops to Canada, and other great warlike demonstrations both military and naval. It is these facts which turn the "proposal" into a demand, and a very peremptory one at the best.

We have no doubt that it was expedient that the United States should receive this demand as an implied admission that all the cases of impressment which have occurred (and which had not one hundredth part of the excuse that existed in the present case, even supposing that it could not be justified) were not only unwarrantable, but were affronts to the United States, still unatoned for; and as a further admission that the invasion of the actual territory of the United States, and the burning of the steamer *Caroline* there, which vessel certainly had no more decided character of hostility to Great Britain than *Mason* and *Slidell* had toward the United States, was an indefensible invasion of neutral rights; the ratification of which by the British government furnished sufficient cause of war. And we are quite clear that, acting upon the demand as a concession, generally, to neutral rights, which had not before been made by Great Britain, it was expedient that the government should deliver up the captives without hesitation, although we are of opinion that the true principles of international law, as between all nations, will not justify a neutral vessel in transporting the agents of a belligerent, upon a hostile mission, until the rule is recognized that free ships make free goods and free persons. So long as it is unlawful for the neutral to transport contraband of war, and the officers and

soldiers of a belligerent, and so long as enemy's goods are liable to capture when found in a neutral vessel, so long, *upon principle*, the agents of the belligerent, bound upon a hostile mission, cannot be protected from capture by the neutrality of the carrier. There will be a time for the discussion of these principles hereafter.

We have no fault to find with the surrender itself. We wish we could say as much of the reply of Mr. Secretary Seward, by and through which the surrender was made. We have failed to appreciate the course of reasoning by which the Secretary arrives at his conclusion. He congratulates himself near the close that he finds himself at last upon the ground occupied by Mr. Madison, in relation to impressment. But how he got there it "would puzzle a Philadelphia lawyer" to discover, and a logician of ordinary acquirements must be equally at fault.

The reply places upon the record the facts in relation to the character of the Commissioners, with certain statements of the proceedings of Captain Wilkes, as understood by the government of the United States, showing that there was nothing offensive in the manner of the capture, and it then states that the case resolves itself into the following inquiries, to wit:—

"1. Were the persons named and their supposed despatches contraband of war?

"2. Might Captain Wilkes lawfully stop and search the Trent for these contraband persons and despatches?

"3. Did he exercise that right in a lawful and proper manner?

"4. Having found the contraband persons on board, and in presumed possession of the contraband despatches, had he a right to capture the persons?

"5. Did he exercise that right of capture in the manner allowed and recognized by the law of nations?

"If all these inquiries shall be resolved upon in the affirmative, the British government will have no claim for reparation."

The first four of the questions are discussed very briefly, with an affirmative conclusion. But the Secretary finds that the difficulties of the case commence with the fifth question, because the case presented is of contraband persons, and not contraband goods. We give the statement in his own words:—

“Only the fifth question remains, namely: Did Captain Wilkes exercise the right of capturing the contraband in conformity with the law of nations?”

“It is just here that the difficulties of the case begin: What is the manner which the law of nations prescribes for disposing of the contraband, when you have found and seized it on board of the neutral vessel?”

“The answer would be easily found if the question were, What shall you do with the contraband vessel? You must take or send her into a convenient port, and subject her to a judicial prosecution there in admiralty, which will try and decide the question of belligerency, neutrality, contraband, and capture. So again you will promptly find the same answer if the question were, What is the manner of proceeding prescribed by the law of nations in regard to the contraband, if it be property or things of material or pecuniary value?”

“But the question here concerns the mode of procedure, in regard, not to the vessel that was carrying the contraband, nor yet to the contraband things which worked the forfeiture of the vessel, but to contraband persons.

“The books of law are dumb. Yet the question is as important as it is difficult. First, the belligerent captor has a right to prevent the contraband officer, soldier, sailor, minister, messenger, or courier from proceeding in his unlawful voyage, and reaching the destined scene of his injurious service.

“But, on the other hand, the person captured may be innocent, that is, he may not be contraband. He therefore has a right to a fair trial of the accusation against him. The neutral state that has taken him under its flag is bound to protect him if he is not contraband, and is therefore entitled to be satisfied upon that important question. The faith of that state is pledged to his safety, if innocent, as its justice is pledged to his surrender, if he is really contraband.

"Here are conflicting claims, involving personal liberty, life, honor, and duty. Here are conflicting national claims involving welfare, safety, honor, and empire. They require a tribunal and a trial. The captors and captured are equals, the neutral and the belligerent state are equals.

"While the law authorities were found silent, it was suggested at an early day by this government that you should take the captured persons into a convenient port and institute judicial proceedings there to try the controversy. But only courts of admiralty have jurisdiction in maritime cases, and these courts have formulas to try only claims to contraband chattels, but none to try claims concerning contraband persons. The courts can entertain no proceedings and render no judgment in favor or against the alleged contraband men.

"It was replied, All this is true; but you can reach in these courts a decision which will have the moral weight of a judicial one. By a circuitous proceeding convey the suspected men, together with the suspected vessel, into port, and try there the question whether the vessel is contraband; you can prove it to be so by proving the suspected men to be contraband, and the court must then determine the vessel to be contraband.

"If the men are not contraband, the vessel will escape condemnation. Still there is no judgment for or against the captured persons. But it was assumed that there would result from the determination of the court, concerning the vessel, a legal certainty concerning the character of the men. This course of proceeding seemed open to many objections. It elevates the incidental inferior private interest into the proper place of the main paramount public one, and possibly it may make the fortunes, the safety or the existence of a nation depend on the accident of a merely personal and pecuniary litigation.

*"Moreover, when the judgment of the prize court upon the lawfulness of the capture of the vessel is rendered, it really concludes nothing, and binds neither the belligerent state nor the neutral upon the great question of the disposition to be made of the captured contraband persons. That question is still to be really determined, if at all, by diplomatic arrangement, or by war."*

So far very well. Whether the principles which are to



govern the *right of capture* are those which relate to contraband goods, or to enemy's property, or both; when we come to the capture of persons, and not of goods, the *principles* which govern the *mode of procedure* fail, because there is no tribunal designated by international law having jurisdiction over the case. For the determination of questions concerning the vessels and goods there are tribunals recognized by the law of nations. For the determination of questions concerning the capture of persons there is no tribunal acting directly *in personam*, or which pronounces any opinion respecting the captured persons, except as that opinion is incidental to the determination of the liability or rights of the vessel, which forms the subject-matter of the inquiry and the decree. Mr. Seward well says, that the judgment of the prize court concludes nothing, and binds neither the belligerent nor the neutral, and that the disposal of the captured persons is still to be determined, if at all, by diplomatic arrangement or by war. But when, after expressing surprise that the law of nations has furnished no more reasonable or perfect mode of determining questions of that character, he proceeds to state, that the regret we may feel on the occasion is nevertheless modified by the reflection that the difficulty is not altogether anomalous, and to say that *equal* and *similar* deficiencies are found in every system of municipal law, especially in the system which exists in the greater portions of Great Britain and of the United States,—and gives, as examples, the actions of trover and ejectment, in the first of which there is merely the fiction of alleging in the declaration that the property has been lost by the plaintiff and found by the defendant; and in the other merely the supposition of a lease, with a fictitious lessee and a casual ejector, in order to avoid certain objections to a trial of the title by direct averments between the real parties; but in both of which the courts have ample jurisdiction, and the merits of the case are tried precisely as if no

fiction was resorted to, — we must confess our surprise that any analogy could be imagined. Nor is our surprise lessened when the Secretary proceeds to say : —

“ If there be no judicial remedy, the result is, that the question must be determined by the captor himself on the deck of the prize vessel. Very grave objections are against such a course. The captor is armed ; the neutral is unarmed. The captor is interested, prejudiced, and perhaps violent ; the neutral, if truly neutral, is disinterested, subdued, and helpless.

“ The tribunal is irresponsible, while its judgment is carried into instant execution. The captured party is compelled to submit, though bound by no legal, moral, or treaty obligation to acquiesce.”

Clearly, thus far, the case is like that of the capture of goods. The question of the right to capture is never determined by the captor upon the deck of the prize vessel ; and the objections stated apply to all cases of capture. If they are valid against the capture of persons supposed to be hostile agents, they are equally so against the capture of persons supposed to be officers and soldiers, and of goods supposed to be contraband also. The captor must always, of necessity, determine whether the case is one in which he will assume to exercise the belligerent right ; for he never carries a prize court with him. But he only determines for himself whether he will assume the right. If he capture goods and vessel, he sends them into port, for disposition, through process of law, in a prize court. If he capture persons, he sends them into port, and places them in the custody of the government, for such disposition of them as shall be required and allowed by the law of nations. The prize court of the belligerent may be as unscrupulous with regard to the vessel and goods as the government may be as to the persons, and in either case the neutral nation will not be bound by the determination, but may seek its redress as well in one class of cases as the other, and by the same means, and if “ reparation is distant and

problematical, and depends at last on the justice, magnanimity, or weakness of the state in whose behalf and by whose authority the capture was made," in regard to captured persons, it is quite as likely to be so in respect to goods, when there has been a condemnation.

It may be admitted, that in ordinary cases the judicial tribunal which determines in relation to the property, may be expected to be guided more by legal principles than the government which determines in respect to the persons, and which is influenced, perhaps, by political considerations. But the prize court is influenced, to some extent, by such considerations, in determining the rule which is applicable to the case; and whatever difference exists is not a difference in principle, nor one which arises from any necessity. The Secretary inquires: —

"What if the state that has made the capture unreasonably refuse to hear the complaint of the neutral or to redress it? In that case the very act of capture would be an act of war, of war begun without notice, and possibly entirely without provocation."

But the same will be true if the prize court of the belligerent confiscate ship or goods, and the neutral is dissatisfied with the decision. The Secretary says further: —

"It must be confessed, however, that while all aggrieved nations demand, and all impartial ones concede, the need of some form of judicial process in determining the character of contraband persons, no other form than the illogical and circuitous one thus described exists, nor has any other yet been suggested. Practically, therefore, the choice is between that judicial remedy or no judicial remedy whatever. . . . ."

"I think all unprejudiced minds will agree that, imperfect as the existing judicial remedy may be supposed to be, it would be, as a general practice, better to follow it, than to adopt the summary one of leaving the decision with the captor, and relying upon diplomatic debates to review his decision. Practically, it is a question of choice

between law, with its imperfections and delays, and war, with its evils and desolations."

But this illogical, circuitous, judicial remedy is no remedy at all, as the Secretary had before shown very conclusively, where he says that there is no judgment for or against the captured persons, and that the question is to be determined, if at all, by diplomatic arrangement or by war.

Suppose, by way of illustration, that a prize crew had been put on board the Trent, and she had been sent in for adjudication; and that upon the filing of the libel, and the hearing of the case, the judge of the prize court had declared his opinion that Mason and Slidell were liable to capture, on the principle that subjected enemy's goods to capture, but that he did not find that the transportation was a violation of neutrality, and therefore the vessel was not liable to confiscation; and thereupon he discharged the vessel, with costs for detention. No proceedings would have been had against Mason and Slidell. They would not have been parties to the libel or the trial, nor entitled to be heard, and of course there would be no judgment against them. But the government would still hold them, and allege the original capture and the opinion of the prize court as a justification. What kind of a judicial remedy would that be against those persons, who, having no opportunity to be heard in the court, were nevertheless claimed as bound and held by the judgment, notwithstanding that the vessel, against which the proceedings were had, was released? As to them, it would not be even an illogical and circuitous remedy. It is a farce, or worse, to designate it as a judicial remedy. There clearly is no judicial remedy in any case of the capture of persons, international law having provided no tribunal with jurisdiction over such case.

This may be a defect: it undoubtedly is so; one proper to be remedied by separate treaty, or by a congress of nations.

But it is better to admit the defect, and to place the responsibility of determining the question, as a political question (which it truly is in the existing state of the law), upon the government making the capture, than to talk about a judicial remedy, upon a political question, in a prize court, which has before it no process against the person, does not hear him, nor render any judgment for or against him, for the reason that it has no jurisdiction whatever over him. The total want of jurisdiction of any prize court over Mason and Slidell, over the political offences which they have committed, and over the question whether they should be held or discharged under the capture, cannot for a moment be denied. All this serves to show the utter folly of the position, which has been contended for so strenuously by some persons, that it was necessary to send in the Trent for adjudication, in order to legalize the capture of the persons, supposing that a right of capture existed, even although there might be no right to have the vessel confiscated.

But we perceive as we proceed why Mr. Secretary Seward, after reaching the sound conclusion that the judgment of a prize court could determine nothing in relation to the lawfulness of the capture of these persons, still admits that, as a general practice, it is better to follow this "illogical" judicial remedy upon a political question over which the court has no jurisdiction, and upon which there is in fact no adjudication. It is in this way that the conclusion is reached that the captain ought to be required to show that the failure of the judicial remedy results from circumstances beyond his control, and without his fault. It is admitted that there are cases in which, even where goods are captured, it is not necessary to send the vessel in for adjudication. Captain Wilkes gave two reasons for not sending in the Trent. His language, as quoted in Mr. Seward's reply, is : —

"I forbore to seize her in consequence of my being so reduced in

officers and crew, and the derangement it would cause innocent persons, there being a large number of passengers who would have been put to great loss and inconvenience as well as disappointment from the interruption it would have caused them in not being able to join the steamer from St. Thomas to Europe. I therefore concluded to sacrifice the interests of my officers and crew in the prize, and suffered her to proceed after the detention necessary to effect the transfer of those commissioners, considering I had obtained the important end I had in view, and which affected the interests of our country, and interrupted the action of that of the Confederates."

We infer from this that Captain Wilkes did not intend to capture the Trent, and did not consider that he had done so. He speaks of her, it is true, as "prize"; but this, taken in connection with his statement that he forbore to seize her, and with all the facts which seem clearly to show that he did not take possession of her, must be construed to mean that he considered her as prize if he had seen fit to treat her as such, but that he concluded merely to detain her long enough to capture the persons.

We do not, however, deem this material. Supposing it to be a case of release after capture, he gives two reasons for it. Mr. Secretary Seward inquires into their validity, and finds the want of a sufficient crew to be a good reason, and the desire to perform the duty of capture without inconvenience to third persons to be a bad one. Supposing this to be legally true, the latter reason certainly could not vitiate the former, because it is perfectly consistent with it. Ordinarily, if a man offer two independent grounds of defence, one good and the other insufficient, the validity of the first is not impeached by the other. If Captain Wilkes was in fact reduced in officers and crew, so that he might for that reason decline to send in the Trent, it is of no consequence that he stated also the great loss and inconvenience it would cause to innocent persons as an additional reason why he forbore to seize her. The

case presented was one for inquiry into the fact of the reduction of the crew, and whether the prudential reason was sufficient. But the Secretary was doubtless willing to reach the conclusion that the prisoners should be surrendered. He could not do this upon the merits of the case, tried by international law, as existing between the United States and Great Britain; and instead of placing the surrender, as he might have placed it, upon the implied relinquishment by Great Britain of the general principles and doctrines which her statesmen and courts have maintained against neutral nations, when she has been the belligerent, and which in consequence have been assumed by jurists here as governing principles, he, unfortunately, as we think, adopted the "illogical and circuitous" reasoning by which he brought the question of the necessity of sending in the Trent as one upon which the question of surrender was to depend, and then (after treating the reasons which were given for the omission as separate and independent) he finally concludes that

"The second reason assigned by Captain Wilkes for releasing the Trent differs from the first. At best, therefore, it must be held that Captain Wilkes, as he explains himself, acted from combined sentiments of prudence and generosity, and so that the release of the prize vessel was not strictly necessary or involuntary."

In other words, he treats the two as a single mixed reason, and the whole mixture as bad and insufficient, by reason of the benevolent alloy or adulteration which was combined with the prudential part relating to the weakening of the crew of his own vessel; and thus he finds that

"For this error the British government has a right to expect the same reparation that we as an independent state should expect from Great Britain, or from any other friendly nation, in a similar case."

Here we reach the reason for the self-congratulation, to which we have already adverted. The Secretary proceeds to say:—

"I have not been unaware that, in examining this question, I have fallen into an argument for what seems to be the British side of it against my own country.

"But I am relieved from all embarrassment on that subject. I had hardly fallen into that line of argument when I discovered that I was really defending and maintaining, not an exclusively British interest, but an old, honored, and cherished American cause, not upon British authorities, but upon principles that constitute a large portion of the distinctive policy by which the United States have developed the resources of a continent, and thus, becoming a considerable maritime power, have won the respect and confidence of many nations.

"These principles were laid down for us in 1804 by James Madison, when Secretary of State in the administration of Thomas Jefferson, in instructions given to James Monroe, our Minister to England.

"Although the case before him concerned a description of persons different from those who are incidentally the subjects of the present discussion, the ground he assumed then was the same I now occupy, and the arguments by which he sustained himself upon it have been an inspiration to me in preparing this reply.

" 'Whenever,' he says, 'property found in a neutral is supposed to be liable on any ground to capture and condemnation, the rule in all cases is, that the question shall not be decided by the captor, but be carried before a legal tribunal, where a regular trial may be had, and where the captor himself is liable to damages for an abuse of his power.

" 'Can it be reasonable, then, or just, that a belligerent commander, who is thus restricted, and thus responsible in a case of mere property, of trivial amount, should be permitted, without recurring to any tribunal whatever, to examine the crew of a neutral vessel, to decide the important question of their respective allegiances, and to carry that decision into execution by forcing every individual he may choose into a service abhorrent to his feelings, cutting him off from his most tender connections, exposing his mind and his person to the most humiliating discipline, and his life itself to the greatest dangers? Reason, justice, and humanity unite in protesting against so extravagant a proceeding.'"

A moment's consideration must serve to show any one that



the two cases are entirely dissimilar. In the cases of impressment it is well known that the British officers who seized sailors on board of American vessels did not place the persons thus taken in the custody of their government for inquiry, and for the determination of the question what disposition should be made of them, but they were immediately put to service in the British navy, and required to perform service therein, as if they had voluntarily enlisted. The commander, therefore, in those cases, not only assumed that there was ground for capture, but he determined the question of right, and carried the judgment into immediate execution. Mason and Slidell, on the other hand, were delivered over to the government for the determination of the question whether the capture was rightful, and it became the duty of the government to make an immediate inquiry, and to decide all questions arising out of it. The analogy to the case of captured goods was carried out, as far as it could be in the absence of any tribunal having jurisdiction over the captured persons. If Captain Wilkes had sentenced Mason and Slidell to hard labor on board of his vessel for their rebellion, there would have been some analogy to the cases of British impressment, to which the instructions of Mr. Madison related.

As the case is thus put by the Secretary, it would seem that the great objection to impressment was, that the British officer did not capture and send in the ship, and that, if he had done so, the objection would have been obviated.

But this is not all. Mr. Seward, after having thus found that Captain Wilkes was wrong in not sending in the vessel, adds:—

“In coming to my conclusion, I have not forgotten that, if the safety of this Union required the detention of the captured persons, it would be the right and duty of this government to detain them.\*

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\* In the debate from which we have made several extracts, Lord Palmerston referred to this passage in Mr. Secretary Seward's reply, in this wise: “Much criti-

"But the effectual check and waning proportions of the existing insurrection, as well as the comparative unimportance of the captured persons themselves, when dispassionately weighed, happily forbid me from resorting to that defence."

We have already adverted to this, and to Earl Russell's reply to it.

The Secretary says, at last: —

"I prefer to express my satisfaction, that, by the adjustment of the present case upon principles confessedly American, and yet, as I trust, mutually satisfactory to both of the nations concerned, a question was finally and rightly settled between them which heretofore exhausted, not only all forms of peaceful discussion, but also the arbitrament of war itself, for more than half a century alienated the two countries from each other, and perplexed with fears and apprehensions all the other nations."

But what question is finally settled by the surrender, when it is made explicitly upon the ground that the proceedings were erroneous because the vessel was not sent in, (one of the reasons for the omission to capture and send her in being deemed insufficient,) a ground upon which Great Britain did not place the demand, and which she does not admit to be of itself a sufficient ground on which to place it? And more

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cism has been passed upon a remark of my right honorable friend the Secretary for War, that war puts an end to treaties. Undoubtedly war does put an end to treaties, and even to declarations of this sort [the Declaration of Paris], and in the event of war you would have to rest upon the honor and good feeling of the parties who had agreed to them in time of peace. We have had a recent instance to show that that principle is admitted and acted upon, and that such declarations are not always likely to be observed by governments; because the President of the United States, maintaining, as he did, that the capture of those two gentlemen on board the Trent was at variance with the unvariable and acknowledged principles of the United States, and allowing therefore his duty to give them up, yet declared that, if it had been for the interest [1] of his country, — departing from his own principles, and from the admitted doctrine of the United States, — he should have felt it his duty not to give them up." We doubt whether the President will admit that this is a fair construction of the paragraph above quoted.

especially what is finally settled, when this surrender is accompanied by a declaration that, if the safety of the Union required, it would be the right and duty of the government to detain these persons, notwithstanding the irregular manner in which they came into its possession, and the right of the British government to claim reparation therefor? This, surely, not only settles nothing, but leaves all the matters in a much more involved state than they were before the case of the Trent occurred; and it is for this reason alone that we have dissected the reply of the Secretary, which has been so much lauded by political partisans.

It may be said, that, if the surrender had been made upon the general ground which we have suggested, nothing of international law would thereby have been settled. This is true. But it would have left the whole subject-matter open to discussion and negotiation, and the United States would have stood in a favorable position to press home upon Great Britain the adjustment of questions relating to neutral and belligerent rights.

The despatch of Earl Russell to Lord Lyons in reply to Mr. Secretary Seward's communication calls into prominence no fact to which we have not already adverted.

The first part of it, in which he states that "the general right and duty of a neutral power to maintain its own communications and friendly relations with both belligerents cannot be disputed," and his suggestions respecting the importance of so doing when the neutral nation has numerous citizens resident in the territories of both belligerents, and when its citizens have property of great value in the territories of each, is well fitted to show that the neutral nation has the right to have ambassadors and consuls within the territories of each belligerent, and to receive and recognize such officers of each belligerent, if an independent and recognized power. Such relations, being once established between two

powers, should not be broken off by a war entered on by either party with a third power, neither should a war prevent the establishment of such relations between either of the parties to it, being an independent nation, and any other power. When such relations are established, a vessel of the neutral nation may carry despatches from the minister or consul of either belligerent residing within the neutral territory to his government at home, on the presumption that such despatches relate to the affairs between the two governments. That was the case of the *Caroline* (6 Rob. Adm. 461), cited by Earl Russell, in which Sir William Scott admitted that the vessel had the right to carry the despatches to the home government, but nevertheless condemned her "to pay for heating the poker," that is, to the costs and expenses of the adjudication. But that case is so unlike the present that it furnishes no precedent. It is valuable only for the principles which are stated in it.

Earl Russell says : —

"It seems no less clear that such communications must be as legitimate and innocent in their first commencement as afterward, and that the rule cannot be restricted to the case in which diplomatic relations are already formally established by the residence of an accredited minister of the belligerent power in the neutral country. It is the neutrality of the one party to the communications, and not either the mode of the communication or the time when it first takes place, which furnishes the test of the true application of the principle. The only distinction arising out of the peculiar circumstances of a civil war and of the non-recognition of the independence of the *de facto* government of one of the belligerents, either by the other belligerent or by the neutral power, is this, that 'for the purpose of avoiding the difficulties which might arise from a formal and positive solution of these questions, diplomatic agents are frequently substituted, who are clothed with the powers and enjoy the immunities of ministers, though they are not invested with the representative character, nor entitled to diplomatic honors.'"

The last part of the paragraph is copied from Wheaton's

“Elements of International Law” (Book III. Ch. 1, § 4), and, standing alone, might perhaps have a tendency to show that Mason and Slidell, having been commissioned by the belligerent government as ambassadors, were to be regarded as diplomatic agents, clothed with the powers and enjoying the immunities of ministers. It is evidently for such purpose that his Lordship cites it, although he subjoins, in very guarded terms, —

“Upon this footing Messrs. Mason and Slidell, who are expressly stated by Mr. Seward to have been sent as pretended ministers plenipotentiary from the Southern States to the courts of St. James and of Paris, must have been sent, and would have been, if at all, received, and the reception of these gentlemen upon this footing could not have been justly regarded, according to the law of nations, as a hostile or unfriendly act toward the United States. Nor, indeed, is it clear that these gentlemen would have been clothed with any powers, or have enjoyed any immunities, beyond those accorded to diplomatic agents not officially recognized.”

But a reference to the preceding paragraph in Wheaton shows that he is speaking of a case in which diplomatic relations of some sort have been already established; and from other parts of his work it appears conclusively that he cannot be cited as an authority for the proposition that Mason and Slidell, on their way to Europe, had any diplomatic character, or that they were entitled to any immunities by reason of their commissions from the Confederate States. On the contrary, those commissions only proved them to be, as we have before said, officers of the Confederacy on an errand hostile to the United States.

In the fourth section of Wheaton, immediately preceding the paragraph quoted by Earl Russell, the author says: —

“In the case of a revolution, civil war, or other contest for the sovereignty, although, strictly speaking, the nation has the exclusive right of determining in whom the legitimate authority of the country resides,

yet foreign states must of necessity judge for themselves whether they will recognize the government *de facto*, by sending to and receiving ambassadors from it; or whether they will continue their accustomed diplomatic relations with the prince whom they choose to regard as the legitimate sovereign, or suspend altogether these relations with the nation in question. So, also, where an empire is severed by the revolt of a province or colony declaring and *maintaining* its independence, foreign states are governed by expediency in determining *whether they will commence* diplomatic intercourse with the new state, or wait for its recognition by the metropolitan country."

The words which we have italicized in this paragraph give us the application of the paragraph cited by Earl Russell. In a note by the editor of Wheaton to the paragraph cited by his Lordship, reference is made to the instructions which were sent by Mr. Webster, then Secretary of State, to Mr. Rives, Minister of the United States to Paris, upon the last change in the constitution of France by the elevation of the Emperor Napoleon III., in which he said: —

"From President Washington's time down to the present it has been a principle always acknowledged by the United States, that every nation possesses a right to govern itself according to its own will, to change its institutions at discretion, and to transact its business through whatever agents it may think proper to employ.

"This cardinal point in our own policy has been strongly illustrated by recognizing the many forms of political power which have been successively adopted by France in the series of revolutions with which that country has been visited. . . . And if the French people have now, substantially, made another change, we have no choice but to acknowledge that also, and, as the diplomatic representative of your country in France, you will act as your predecessors have acted, and conform to what appears to be the settled national authority."

The text serves to show that the United States would *commence diplomatic intercourse with a new state only upon ascertaining that it maintained, as well as declared, its inde-*

*pendence, and the note that they will continue the intercourse with a nation already existing, in case of a revolution, when the revolutionary power and authority appear to be settled.*

Respecting the privileges and immunities of ambassadors Wheaton says: —

“From the moment a public minister enters the territory of the state to which he is sent, during the time of his residence, and until he leaves the country, he is entitled to an entire exemption from the local jurisdiction, both civil and criminal. Representing the rights, interests, and dignity of the sovereign or state by whom he is delegated, his person is sacred and inviolable. To give a more lively idea of this complete exemption from the local jurisdiction, the fiction of extra-territoriality has been invented, by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign. He continues still subject to the laws of his own country, which govern his personal status and rights of property, whether derived from contract, inheritance, or testament. . . . . This exemption from the local laws and jurisdiction is founded on mutual utility, growing out of the necessity that public ministers should be entirely independent of the local authority, in order to fulfil the duties of their mission. The act of sending the minister, on the one hand, and of receiving him, on the other, amounts to a tacit compact between the two states that he shall be subject only to the authority of his own nation. . . . .

“The minister’s person is, in general, entirely exempt both from the civil and criminal jurisdiction of the country where he resides.” — *Elements*, Part III. Ch. 1, §§ 14, 15.

These extracts, which but express the received doctrines upon the subject, indicate that the broad seal of the Confederate States, even if it were as broad as the Atlantic Ocean, could not confer upon those agents any privileges or immunities, either during their transit or on their arrival in England, until they had been received in a diplomatic character by the British government, or until the independence of the Confederate States should be acknowledged by Great

Britain. When that takes place, it will hardly have a retrospective operation, so as to constitute them ambassadors *ab initio*. Will her Majesty's legal advisers stake their legal reputation upon an opinion that Mr. Mason, when he had landed in England, was entitled to exemption from arrest for debt by reason of the diplomatic character conferred on him by the Confederate government? Not they! Earl Russell himself will not attempt to maintain that proposition for an instant. No respectable county-court lawyer in England will venture such an opinion. (We will not say that such an opinion might not be obtained from M. Hautefeuille, "for a consideration.") Still less will any lawyer in Great Britain undertake to maintain that Mr. Slidell, who was sent to France, was entitled to privileges and immunities in England as a diplomatic agent; and if not, what interest had Great Britain in maintaining the rights and privileges of his embassy either on ship or shore? Earl Russell says: "The general right and duty of a neutral power to maintain *its own communications and friendly relations* with both belligerents cannot be disputed." And again: "In the performance of these duties ['the duties of humanity, reciprocally due from nation to nation'] on both sides, the neutral nation has itself a most direct and material interest, especially when it has numerous citizens resident in the territories of both belligerents." But it is not supposed that Great Britain was the guardian of France in this matter, charged with the duty of maintaining the communication and friendly relations of France with the Confederates, or that she had any direct and material interest in the performance of any duties of humanity arising between France and the Confederation; and if she had not, Mr. Slidell's diplomatic character as ambassador to France, where he has not even to this day been recognized as a diplomatic agent, will not show that he was entitled to privileges and immunities, *as an ambassador*, on board a British vessel. To



what rights and immunities he was entitled as a citizen of the world, or to what liabilities he was subjected as contraband of war, or as an active enemy of the United States, are other and different questions. How far it would be the right or duty of Great Britain to protect him *as an ambassador*, if he had been accredited by an independent nation to the court of Paris, is still another question.

A minister, as we have seen, is under the jurisdiction of his own government while actually resident at the court to which he is accredited. But here again we must recollect that the Confederate States had, as to the United States, only an insurrectionary and belligerent jurisdiction, and as to Great Britain, being recognized only as a belligerent, they had only a belligerent jurisdiction. The British cabinet will hardly admit that there is a belligerent jurisdiction on the part of the Confederate government within the territory of Great Britain. As to her ports, the acknowledgment of the belligerent *status* may be said to have opened them to the vessels of the Confederates, until excluded.

Assuming that he has shown by his own reasoning, and the authority of Wheaton, that Mason and Slidell were entitled to a diplomatic character and diplomatic immunities, Earl Russell proceeds to controvert Mr. Seward's application of Sir William Scott's remark, that you may stop an ambassador ; to maintain that an ambassador is not contraband of war, and cannot therefore be taken on board a neutral vessel ; and further, to deny the application of what that eminent judge said respecting the transportation of civil officers.

In this connection it is quite possible that there is something slightly significant in the use by his Lordship once and again of the term "*dictum*" as applied to certain opinions of Sir William Scott. It is well understood that, in general, this term is applied to those remarks of a judge which are not necessary to the decision of the case, and that, so applied, it

indicates that the remark referred to is not to be regarded as having the character of authority, or perhaps that it is even suspected of being unsound. If this designation is to be applied to all those portions of Sir William Scott's opinions which were not necessary to the determination of the case before him, his "judgments" may be shorn of some of their honors. But Earl Russell does not directly deny that the *dicta* of the judge express the rules of law as they have heretofore been held by Great Britain. He attempts to show that Vattel, who is cited by Sir William Scott as an authority for the position that you may stop the ambassador of your enemy on his passage, does not support the position that you may stop him on board of a neutral vessel. But Earl Russell is unfortunate in supposing that Sir William Scott had reference to but one passage in Vattel, in the remarks which he made respecting exercising the right of war against, and stopping, an ambassador on his passage. His Lordship cites and quotes from Vattel, Book IV. Ch. 7, Sect. 85 : —

"On peut encore attaquer et arrêter ses gens, par-tout où on a la liberté d'exercer des actes d'hostilité. Non-seulement donc on peut justement refuser le passage aux ministres qu'un ennemi envoie à d'autres souverains ; on les arrête même, s'ils entreprennent de passer secrètement et sans permission dans les lieux dont on est maître."

Translated in Mr. Chitty's edition as follows : —

"His people may also be attacked, and seized wherever we have a right to commit acts of hostility. Not only, therefore, may we justly refuse a passage to the ministers whom our enemies send to other sovereigns ; we may even arrest them if they attempt to pass privately, and without permission, through places belonging to our jurisdiction."

But if his Lordship had turned to Chapter V. he would have found that Vattel, after stating, in Section 63, that a sovereign who attempts to hinder another from sending and receiving public ministers does him an injury, and offends against the law of nations, says, in Section 64 : —

“ Mais cela ne doit s'entendre que d'un tems de paix ; la guerre donne lieu à d'autres droits. Elle permet d'ôter à l'ennemi toutes ses ressources, d'empêcher qu'il ne puisse envoyer ses ministres pour solliciter des secours.”

Translated in Mr. Chitty's edition : —

“ But this is to be understood only of a time of peace ; war introduces other rights. It allows us to cut off from an enemy all his resources, and to *hinder him from sending ministers to solicit assistance.*”

We suppose that the substantial fidelity of this *English* translation will not be denied ; and in some cases you can hinder the enemy from sending, only by stopping the ambassador. Sir William Scott, doubtless, had reference to both passages in Vattel, and the latter not only justifies his remark, that “ you may stop the ambassador of your enemy on his passage,” but, if Mason and Slidell were to be regarded as ambassadors or diplomatic agents, it covers the very case ; unless an exception to the right to stop or hinder can be established by reason of the neutrality of the vessel or its position on the voyage. In other words, the diplomatic character, while on their transit, will not save them. There must be something else to establish the exemption.

His Lordship is equally unfortunate when he says further, of the remark of Sir William Scott, “ The sole object which Sir William Scott had in view was to explain the extent and limits of the doctrine of the inviolability of ambassadors in virtue of that character.” We must be permitted to dissent from this conclusion. The case in which the remarks were made was that of the *Caroline*, before referred to, in which the judge held that the carriage of despatches by a neutral, from the minister of a belligerent residing in the neutral territory, to the home government, was lawful, but condemned the vessel to pay costs and expenses, because by taking such despatches the neutral merchant “ gives the captors an unde-

niable right to intercept and examine the nature and contents of the papers which he is carrying," and subjects himself to the inconvenience of having his vessel brought in for examination, and to the necessary detention and expense. After saying of captured despatches, "If the papers so taken relate to public concerns, be they great or small, civil or military, the court will not split hairs, and consider their relative importance," he took a distinction between "despatches coming from any part of the enemy's territory, whose commerce and *communication of every kind the other belligerent has a right to interrupt*," and despatches of ministers resident abroad to the home government of the belligerent, and said, "They are despatches from persons who are, in a peculiar manner, the favorite objects of the protection of the law of nations, ambassadors, resident in a neutral country for the purpose of preserving the relations of amity between that state and his own government."

Still further, to show the propriety of permitting the despatches of the latter to be carried by the neutral, because the neutral country has the right to *preserve its relations* with the enemy, he added : —

"I have before said that persons discharging the functions of ambassadors are, in a peculiar manner, objects of the protection and favor of the law of nations. The limits which are assigned to the operations of war against them, by *Vattel* and other writers upon those subjects, are, that you may exercise your right of war against them, wherever the character of hostility exists; *You may stop the ambassador of your enemy on his passage*; but when he has arrived, and has taken upon himself the functions of his office, and has been admitted in his representative character, he becomes a sort of *middle man*, entitled to peculiar *privileges* as set apart for the protection of amity and peace, in maintaining which all nations are, in some degree, interested."

The italics in this extract are those of Sir William Scott. This statement of the case, and of his language, shows con-

clusively that, so far from its being his sole object to explain the extent and limits of the doctrine of the inviolability of ambassadors, his reference to them was merely by way of illustrating his doctrine in relation to the differences in the character of despatches. The case involved no question respecting the privileges of an ambassador.

Now let us consider the paragraph from Vattel which Earl Russell cites, to the effect that the enemy's people may be attacked and seized wherever we have a right to commit acts of hostility. Upon this proposition of Vattel his Lordship draws this conclusion:—

“The rule, therefore, to be collected from these authorities is, that you may stop an enemy's ambassador in any place of which you are yourself the master, or in any other place where you have a right to exercise acts of hostility. Your own territory, or ships of your own country, are places of which you are yourself the master. The enemy's territory, or the enemy's ships, are places in which you have a right to exercise acts of hostility. Neutral vessels, guilty of no violation of the laws of neutrality, are places where you have no right to exercise acts of hostility.”

We beg leave to say that this conclusion does not result from the principle as stated by Vattel. On the contrary, that of itself seems fully to justify the seizure of an ambassador of the enemy on a voyage from his own country to a neutral port, and in a neutral vessel, because *you may and do exercise acts of hostility on board neutral vessels* having contraband of war or enemy's property on board, and do exercise acts of hostility in every capture of that character. The vessel is captured and sent in *solely upon the ground of the right there to do a hostile act*. When you capture enemy's property, it is an act of hostility against the enemy. When you capture contraband of war, belonging to the neutral, it may be said to be an act of hostility against neutral and enemy also. But in both cases *the justification is founded upon the right to exercise*

*those acts of hostility in and upon the neutral vessel. Ergo,* you may capture the ambassador there, unless there is some other reason than the fact that he is on board a neutral vessel to prevent it.

Of the language of Sir William Scott in the case of the *Orozembo*, — where he says, of the transportation of civilians, “It appears to me, *on principle*, to be but reasonable that, whenever it is of sufficient importance to the enemy that such persons should be sent out on public service, at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations,” — his Lordship says: —

“The other dictum of Sir William Scott, in the case of the *Orozembo*, is even less pertinent to the present question. That related to the case of a neutral ship, which, upon the effect of the evidence given on the trial, was held by the court to have been engaged as an enemy’s transport, to convey the enemy’s military officers, and some of his civil officers whose duties were intimately connected with military operations, from the enemy’s country to one of the enemy’s colonies, which was about to be the theatre of those operations, the whole being done under color of a simulated neutral destination. But as long as a neutral government, within whose territories no military operations are carried on, adheres to its profession of neutrality, the duties of civil officers on a mission to that government, and within its territory, cannot possibly be ‘connected with’ any ‘military operations’ in the sense in which these words were used by Sir William Scott, as, indeed, is rendered quite clear by the passages already cited from his own judgment in the case of the *Caroline*.”

Now we must say, that the case does not show that the civil officers in question were connected with any military operations, nor that Sir William Scott’s remarks had reference to any military operations with which it was supposed they might be connected. He says of them, that they were “persons who were going to be employed in civil capacities in the govern-

ment of Batavia"; and the principle of which he speaks seems to be the general principle on which you may wage war, annoy the enemy, interrupt his communications, or capture his despatches. In the case of the *Caroline* he says: "It is the right of the belligerent to intercept and cut off *all* communication between the enemy and his settlements, and, to the utmost of his power, to harass and disturb this connection, which it is one of the declared objects of the ambition of the enemy to preserve."

After quoting a paragraph from Bynkershoek (*Quæst. Jur. Pub.*, Lib. I. cap. 9), his Lordship says:—

"The principle of contraband of war is here clearly explained; and it is impossible that men, or despatches, which do not come within that principle, can in this sense be contraband. The penalty of knowingly carrying contraband of war is, as Mr. Seward states, nothing less than the confiscation of the ship; but it is impossible that this penalty can be incurred when the neutral has done no more than employ means usual among nations for maintaining his own proper relations with one of the belligerents. It is of the very essence of the definition of contraband, that the articles should have a hostile, and not a neutral destination. 'Goods,' says Lord Stowell, 'going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful. The rule respecting contraband,' he adds, 'as I have always understood it, is, that articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port.'"

And thereupon his Lordship asks:—

"On what just principle can it be contended that a hostile destination is less necessary, or a neutral destination more noxious, for constituting a contraband character in the case of public agents or despatches than in the case of arms and ammunition?"

To the question thus put we confidently answer, that the difference is quite material and the distinction plain. Ordinarily, contraband goods and munitions of war can be made available to the enemy only by transportation to some place

where the enemy can put them to use or service. Usually this is a transportation to an enemy's port. Persons sent to solicit assistance, or purchase arms and ammunition, — whether designated as ambassadors, or commissioners, or hostile agents, — are made available, and perform the hostile service abroad ; and the destination, of course, is to the neutral country. If, therefore, such agents can be seized at all, under any circumstances, they may be seized on their outward passage ; for that alone will prevent the hostile service which they are to perform.

But, notwithstanding what is thus said by Sir William Scott, we suppose that there can be no doubt that a neutral vessel, transporting munitions of war from a neutral port to a neutral port, there to be delivered to a vessel of the enemy lying there, would be guilty of as great a violation of neutrality as if she were transporting them directly to a port of the belligerent. Sir William Scott did not refer to such a case, because the case before him did not require it ; but Earl Russell will hardly contend, that, if the captain of the Trent had, at Havana, taken on board two rifled cannon and two smooth-bores, to be delivered on board the Nashville, at Southampton, the fact that the destination was to a neutral port would have been sufficient to save her from capture and confiscation. This serves to illustrate the principle. The question is, not what is the character of the port of destination, but whether the transportation is for the hostile service. If the transportation is of munitions of war, and the goods are to be landed at a neutral port, and a subsequent disposition to be made of them, which has no connection with the voyage by which they are transported thither, then they are not contraband of war ; although there may be a supposition that they will be there sold, at a round price, and will eventually reach the enemy's territory ; because such sale and subsequent transportation are not connected with the original voyage. But if the goods



were transported to the neutral port, to be there put on board another vessel, and carried to a port of the enemy, the last voyage is but a continuation of the first, and the whole is a single transaction.

But we are not without authority on this point of the neutral destination, and very good English authority too. Dr. Phillimore, in his recent very learned work upon international law, recognizes the right of the belligerent to make search and seizure where the voyage is from one neutral port to another neutral port. He puts that as a case, not of exemption, but as one where there is less to excite vigilance, and as one where allowance should be made for the ignorance of the master, or for imposition practised on him. He is speaking of despatches, and says : —

“ It is indeed competent to those interested with the care of the ship on board of which such despatches are found, to discharge themselves from the imputation of being concerned in the knowledge or management of the transaction. But the presumption is strong against the ignorance of the master of the ship ; and when he has knowingly taken on board a packet or letter addressed to a public officer of a belligerent government, the plea of the insignificance of the communication, and its want of connection with the political objects of the war, will not avail him ; nor, except perhaps in an extreme case of imposition practised upon him, will the plea of ignorance of the *contents* of the despatches avail him : his redress must be sought against the person whose agent or carrier he was.

“ With respect to such a case as might exempt the carrier of despatches from the usual penalty, it is to be observed, that, *where the commencement of the voyage is in a neutral country, and to terminate at a neutral port*, or at a port to which, though not neutral, an open trade is allowed, in such a case there is less to excite the vigilance of the master ; and therefore it may be proper to make some allowance for any imposition which may be practised on him. But where the neutral master receives papers on board in a hostile port, he receives them at his own hazard, and cannot be heard to avow his ignorance of a fact

with which, by due inquiry, he might have made himself acquainted." —  
*3 Int. Law*, 374.

There is a suggestion in Earl Russell's despatch relating to the contract service of the Trent to carry Her Majesty's mails. It is said : —

"It is to be further observed, that packets engaged in the postal service, and keeping up the regular and periodical communications between the different countries of Europe and America, and other parts of the world, though, in the absence of treaty stipulations, they may not be exempted from visit and search in time of war, nor from the penalties of any violation of neutrality, if proved to have been knowingly committed, are still, when sailing in the ordinary and innocent course of their legitimate employment, which consists in the conveyance of mails and passengers, entitled to peculiar favor and protection from all governments in whose service they are engaged. To detain, disturb, or interfere with them, without the very gravest cause, would be an act of a most noxious and injurious character, not only to a vast number and variety of individual and private interests, but to the public interests of neutral and friendly governments."

It will be noted that Earl Russell distinctly admits that there is no exemption from capture by reason of this postal service. We adverted to this subject in our previous article, in which this case was partially discussed. It is quite clear that such a contract does not change the character of the vessel from that of a private merchant-ship to that of a national vessel. The bluster of Commander Williams, who occupied the respectable station of mail-guard, and whose conduct was not as respectable as his station, was entirely out of place. With the removal of these persons he had, so far as appears, nothing whatever to do, and the cabin-boy might have interfered with as much authority. Such a contract does not render the British government responsible for the supplies of the ship, nor for the conduct of the master ; nor can it alter the rules of international law applicable to her as a merchant-

ship, or the right of a belligerent against her as a neutral. She is not authorized to carry contraband of war, or exempted from the penalties of a violation of duty in this respect, merely because her owners have a contract which gives them certain profits for transporting the mails, and subjects them to the duty of the carriage. The change of the mode of communication from that of casual and occasional transportation through the letter-bags of merchant vessels, to that of regular mail-service by similar vehicles propelled by steam, may furnish a reason why, under certain safeguards against a violation of neutrality, the mail-packet should be exempt from search and seizure; and the treaty which gives the exemption will specify and provide for the safeguard. But until such treaty stipulation shall exist, all the concern that the belligerent has with such contract and transportation by the neutral is, as an act of comity, to exercise his belligerent right in such a manner as to cause no unnecessary interruption to the postal service of the neutral; which is precisely what was done by Captain Wilkes in this case. And we are pleased to observe that Earl Russell, so far from alleging the omission to capture and send in the Trent as a distinct matter of grievance, or as furnishing specific ground of objection, says that the fact of the capture of the vessel being brought before a prize court, "although it would alter the character, would not diminish the gravity of the offence against the law of nations which would thereby be committed."

We make this extended reference to the portion of the case relating to postal service, because it has been put forward by speech-makers and paragraphists in England, and by sympathizers in America, as a distinct ground of objection to the proceedings of Captain Wilkes.

The treaty by which postal ships between the two countries are entitled to certain exemptions in case of war, which has been cited to show that the character of the Trent as a mail-

packet should have given her some protection from seizure, so far from furnishing such proof, is a strong circumstance to show the reverse of that proposition. The provision by special agreement for the protection, shows that the change in the mode of transacting business does not of itself furnish protection.

Thus far we have considered the case on its analogy to the capture of goods contraband of war, Earl Russell, following the lead of Mr. Seward, having argued it on that basis. It has been supposed that the legality of the capture must depend upon the question, Contraband of war or not? But we are of opinion that the analogy to the case of enemy's goods is quite strong, and by no means to be ignored. Considered in reference to the principles which regulate the capture of such goods, some of the objections to the legality of the proceeding vanish at once. It seems necessary only to establish the hostile character of the persons at the time of the capture. In this view of the case there is no longer any question as to the direction and termination of the voyage, as enemy's goods may be captured on any voyage; and the question respecting the necessity of sending in the vessel must disappear, because the carriage of enemy's goods does not render the vessel liable to confiscation. There would have been no necessity for sending in the Trent for the carriage of the persons, nor in fact any propriety in so doing; and an adjudication releasing the vessel, if she had been sent in, and requiring the captors to pay the costs of sending her in, could not be required. There would have been no good reason for libelling her. The legal proceedings would with more propriety have come from the master or owners, to procure the payment of expenses.

In the view of the case we have thus presented we have been content to treat the act of the Trent as if it were not one of hostility; but it is by no means clear that it is entitled to that favorable construction. Our limits, however, admon-

ish us that it is not expedient to enter upon the discussion of that question.

From the examination we have thus made of the principles of international law, as existing between the United States and Great Britain at the time when the Trent was stopped, we draw these inferences and conclusions, to wit: —

1. Regarding Messrs. Mason and Slidell as being, in the language of Earl Russell, *quasi* ambassadors, the principle quoted from Vattel and approved by Sir William Scott, stated by Dr. Phillimore and indorsed by Mr. Wheaton, that you may stop the ambassador of your enemy on his passage, has for its foundation a right to deal with him as an enemy, and an important officer of the enemy, who is not protected, on his outward passage, by his diplomatic character, even on board a neutral vessel; and that you may capture him, notwithstanding he has reached a neutral port, and taken his passage from that place, provided he has not reached the country of his destination, the voyage from the neutral port which he has reached to the port of his destination being but a continuation of the voyage originally undertaken.

2. If, on principle, you may capture an ambassador under such circumstances, *a fortiori* you may capture any hostile agent or official of the enemy, found proceeding, under like circumstances, on a hostile errand or mission. In fact, upon principle, the right to capture the latter exists, even if a right to stop the former were denied.

3. The right to capture despatches being conceded, (with the exception of despatches from, and even to, ambassadors and consuls abroad,) *a fortiori* you may capture the bearers of despatches, commissioned for that purpose, being at the same time, in the emphatic language of Captain Wilkes, themselves "the embodiment of despatches." This case is not within the exception, there being no ministers or consuls of the Confederate States abroad, but agents only, who were exerting all possible diligence in hostility to the United States.

4. Upon the principles which regulate the transportation of contraband of war, in the absence of treaty stipulations, Mason and Slidell were as much contraband as officers and soldiers, and equally liable to capture. The question is not dependent upon the usage of wearing a uniform and a feather, nor upon the use of arms merely. If a character of hostility attaches to the person at the time as an agent or civil officer, he is liable to capture. The errand of Mason and Slidell was emphatically one of hostility, and it makes no difference whether the voyage was or was not from neutral port to neutral port, if in the prosecution of it the parties are giving aid to the hostilities of the enemy.

5. Upon the principles which regulate the capture of enemy's goods, which bears the closest analogy to the case of the capture of enemy persons, the latter are liable to capture wherever found on the high seas, and these persons were most emphatically enemies, in actual hostility at the time.

6. In the case of the capture of persons only, the belligerent may well waive the right to capture the neutral vessel in which they are found (supposing such right to exist) for any reason that seems sufficient to him, and the omission to send in the vessel cannot affect the right of capture and detention, because there is no judicial tribunal having jurisdiction to try the validity of the capture, even if the vessel were sent in.

Mr. Secretary Seward, in his communication to Lord Lyons, says: "The claim of the British government is not made in a discourteous manner. This government, since its first organization, has never used more qualified language in a similar case." And Mr. Sumner, in his speech in the Senate, refers to the delivery of the parties as having been done at the instance of the British government, "courteously conveyed."

While we have no desire to add anything to the honest indignation which has been exhibited by the great body of the

Northern people respecting the circumstances under which this demand was made, we must protest against these admissions, as being utterly unfounded, and therefore improper. It is true that the phrase of the despatch was that of the most studied courtesy. After a statement of facts which omitted all the well-known reasons which induced Captain Wilkes to make the capture, the conclusion is reached, and undoubtedly well reached on that statement of facts, that the government of the United States ought to offer such redress as alone should satisfy the British nation; and that is, the liberation of the prisoners and a suitable apology for the aggression. "Should these terms not be offered by Mr. Seward, you will propose them to him."

If this had been all, and the United States government had been left free to present the full statement of facts, and its views of the right to make the capture, the courteous tone of the despatch would have deserved all commendation. But behind all this are the instructions to Lord Lyons to leave Washington within a week if the demand should not be complied with,—most extensive naval and military preparations in England,—the immediate embarkation of large bodies of troops for Canada,—and orders to the commanders of naval squadrons in the Gulf and elsewhere, the nature of which may be surmised, although not promulgated. To the inquiry made by Mr. Adams, in consequence of these preparations, whether a refusal would be followed by war, it was answered that the course was not determined on; and Lord Lyons was instructed, if an inquiry should be made by Mr. Seward as to the consequence of a refusal, to make an equally oracular reply.

It was fully understood, therefore, as well as if it had appeared in the despatch itself, that any attempt to sustain the seizure on the principles of international law as used and heretofore approved by Great Britain would be at the peril of

instant war, and that Great Britain held herself in readiness to avail herself of her great naval strength to ravage our unprotected coasts, towns, and cities, in order to avenge the outrage of stopping the Trent for an hour or so, and taking from that vessel four persons, not subjects of Great Britain, and in whom she professed no interest, except as they were passengers on board a passenger packet belonging to her subjects. Really this is a somewhat strong exhibition of courtesy. If this be courtesy, "save us from our friends."

Taking the statement of facts, as presented by Earl Russell himself, without qualifications, — suppose the seizure to have stood without justification and without excuse, — it did not appear to have been made by the order of the government in the first instance, and at the most it could have been supposed to be only a mistake of his rights on the part of Captain Wilkes. Putting the worst construction upon it, the case was not one which required instant war, or a demand with instant war as the possible alternative of non-compliance. It is not wonderful that this kind of courtesy should have elicited a deep feeling on the part of the people of the United States, which, although it has subsided, is not extinguished, nor likely to be entirely so within the present generation. The case is in singular contrast with the conduct of the United States, which remonstrated and negotiated respecting impressment for years and years before threatening hostilities; and which let the invasion of their territory and the burning of the Caroline remain to be discussed, years afterward, by Mr. Webster and Lord Ashburton. Perhaps the expenditure of Great Britain, incurred by these warlike preparations, whether it was to the extent of five or twenty millions, and the loss of a direct trade with the Northern States, occasioned by the course of the British government, to the amount of some twenty millions more or less, with the incidental losses otherwise occasioned by a fear of war on the part of her own



subjects, may be regarded as some punishment for the insane violence of her press and people, which drove the government into such an exhibition of national courtesy, and proved, *that it is in a constitutional monarchy that the mob is the ruling power*, and not in a republic.

As we have become pretty well accustomed, within the last year, to the manifestations of injustice toward the United States by a very large portion of the English press, and even to their openly expressed wishes that the Confederates may succeed in their attempts to dismember the Union, the warlike ebullition of the English people upon the capture of Mason and Slidell was less surprising to us than it would otherwise have been. But we must admit, that it was with a little astonishment that we have perused, in the columns of the New York Times, of January 4th, an article purporting to be an opinion of M. Hautefeuille upon this subject, to which we have already referred. Known as an extreme supporter of neutral, as against belligerent rights, it might have been expected that his views, based upon what he deemed the true principles of international law, would be adverse to the right of capture, because he has advocated, to the full extent, the principle, that free ships make free goods, and of course free persons; and maintains that, unless the ship is let out to the belligerent for the purposes of the transportation, there is no violation of neutrality. Rejecting, as he does, the British decisions as authority, he himself cannot be regarded as authoritative on the questions at issue, and the expression of an opinion by him, adverse to the proceedings of Captain Wilkes, if put forth in terms of ordinary courtesy, would not have called for special remark. But the tone of this article and the *animus* exhibited in it are such that we hesitated respecting its authenticity; and it is only upon assurances that no doubt exists on that point that we feel at liberty to speak of it, and its author as we had intended to do, according to its and his merits, or rather demerits.

We have not space, however, at the present time to do justice to the subject, and it may be that we shall not consider it of sufficient importance to advert to it hereafter. We close, therefore, with a few short extracts, and a single remark.

“President Lincoln affirms that there is no Southern Confederation, — that there are only citizens of the United States in rebellion against legitimate authority; whence he concludes that he is engaged in chastising — in reducing to subjection — rebels, but that there is no war. It is in order to effect this chastisement that he, the representative of legitimate power, declares all ports of the Southern States closed to foreign commerce, and that he decrees the confiscation of all vessels found guilty of having attempted to violate the law made by the territorial sovereign. Thus, it is not for having violated a blockade, it is for having disobeyed a custom law, that neutral vessels have been condemned. There are, therefore, no belligerents, but only, on the one hand, rebels, and on the other hand, a legal power, resolved, by mere force, to bring them back to their obedience. It is in the character of rebels that Messrs. Slidell and Mason have been seized. This simply amounts to saying that rebels may be seized and arrested wherever they shall be found, even on board a foreign vessel, or, in other words, in a foreign territory. . . . .

“If, then, there be no war, if the Americans be not belligerents, the act perpetrated by the commander of the *San Jacinto* against an English vessel is an outrage committed against the independence of the British flag; it is an act of downright piracy, for which the perpetrator, if he acted without the special orders of his government, should be made responsible to the tribunals, but of which the whole responsibility will fall on the Cabinet of Washington, if it has given instructions to that effect.

“But had the *Trent* committed a contravention of any customs regulations? Had she disobeyed the sovereign orders of Mr. Lincoln? Even admitting for a moment the monstrous pretension of the President of the Northern States, we have no hesitation in replying in the negative. . . . .

“Therefore, from this point of view, as well as from others, the act committed by the commander of the American frigate, the *San Jacinto*,

is opposed to the most elementary and the most important principles of maritime international law. It constitutes an aggression on the liberty of the seas, and an audacious outrage on the English flag.

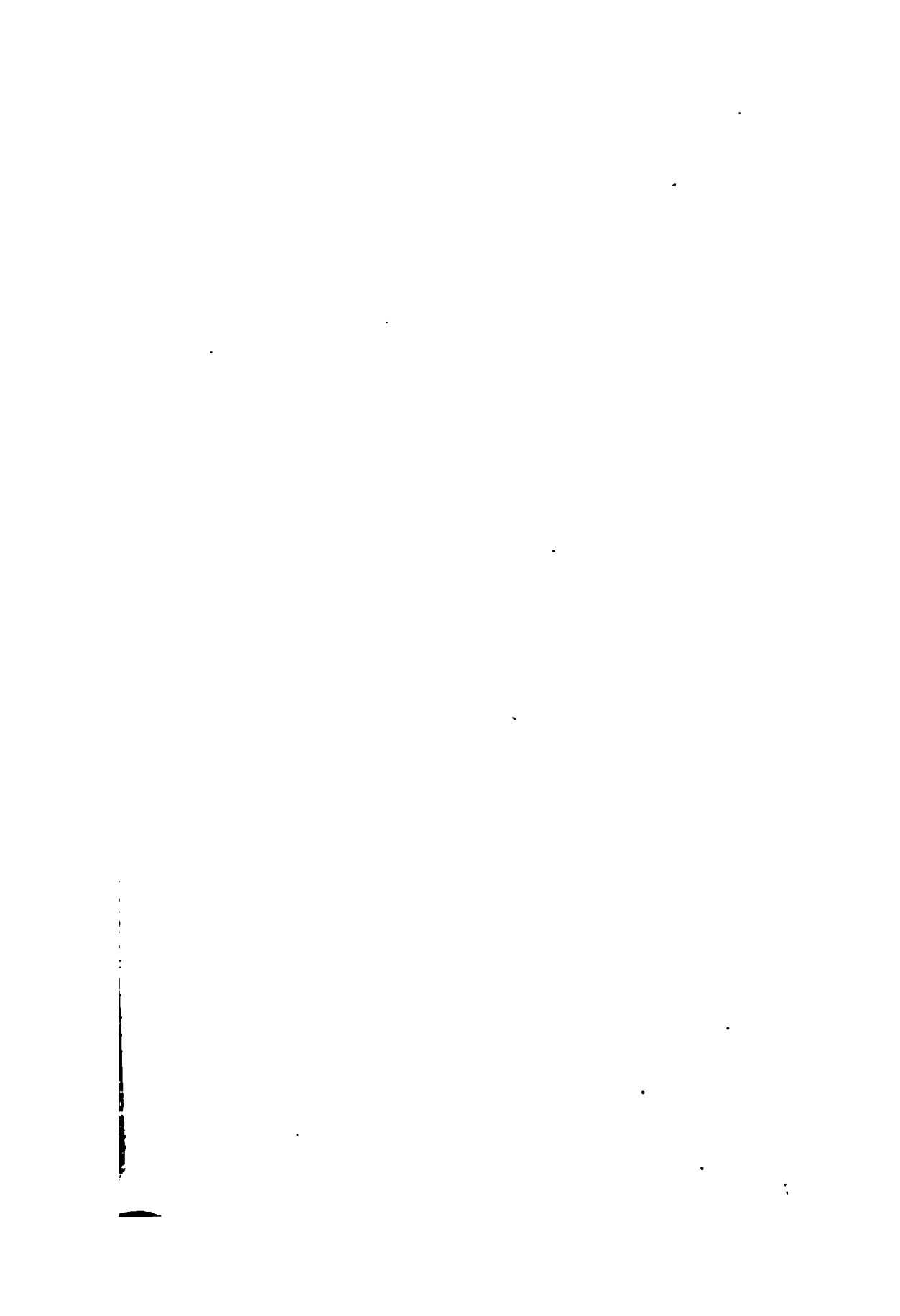
“What motives, what excuses, can the Northern Americans allege to, we will not say justify, but even to explain this outrage? . . . .

“Mr. Lincoln would do well to reflect, that neither France nor the other powers would tolerate the perpetration of such outrages on the persons of their subjects; nor would they, without demanding full satisfaction, endure the insolence and brutality too common to certain American officers in the exercise of their rights. . . . .

“The Northern Americans should beware of calculating on the too great longanimity shown towards them by England of late years, or supposing that this Trent business will be settled in their favor, like that of the Island of San Juan, and so many others. Times are changed. The United States were lately the exclusive holders of an article indispensable to the commerce, the industry, and, consequently, the prosperity, of Great Britain. Cotton weighed immensely in all the decisions of the English Cabinet. Now the United States no longer possess cotton,—the precious article is in the hands of the Southern Confederation. The interests of England naturally lead her in the direction of the cotton producers, and assuredly this business of the Trent, if not settled by ample satisfaction, is of such a character as to lead England to take the step which in all probability she would not have done so soon.”

It seems quite clear that this opinion must have been obtained through Confederate instrumentality; and it was probably paid for in something much better than the bonds of the Confederate States.









John B. ...

## TO THE PEOPLE OF MASSACHUSETTS.

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I PRESUME to solicit your attention because I have something to say which I wish you to consider. I place my name to what is written because an anonymous communication would at this time hardly attract notice; and furthermore, as a pledge of the sincerity with which the matter is presented. And I address you directly, believing that your good sense will prefer that mode to the stale artifice of procuring some one to write a letter requesting my opinions, and then giving them the form of a reply to the correspondent, who acts as cat's-paw to elicit them.

Fully aware that any weight which may be attached to my remarks at this time must depend in a great measure upon my previous political opinions, I ask the privilege of so much egotism as will enable me to state, that in the presidential campaign of 1856 I made an elaborate speech sustaining, as well as I might, the constitutional power of Congress to restrict slavery in the Territories, and voted for Fremont;—subsequently, in a series of papers, denounced the Dred Scott decision;—voted for Abraham Lincoln;—have pledged myself that my opposition to slavery knows none but constitutional and prudential limits;—have advocated to the best of my ability a vigorous prosecution of the war even to the organization of negro regiments and brigades, if it can be done without detriment to the public service, and to the arming of slaves and “letting them fight in their own parties and under their own leadership,” whenever a slave insurrection could be made available to put down the rebellion.

These facts are adduced to disprove any, even the least, sympathy with what is called “Breckinridge Democracy,” the term being used to denote sympathizers with the rebellion.



Furthermore: I am not nor have been a candidate for any office in the gift of the National or State Executive, or of the People, — have therefore no personal interests or aspirations to serve, — and no disappointments to avenge; — nor have I any private spite or pique to gratify, having had no personal difference with any of the candidates now before the public, until Mr. Sumner, in consequence of criticisms upon his political course, saw fit to make the matter personal between us. Any other gentleman is at perfect liberty to do the same, and the dispensation will be accepted with the same resignation with which his demonstrations of personal hostility have been received.

These facts may, perhaps, serve to assure you that I am actuated by no motives, except a sincere desire to serve the best interests of our common country.

I should not presume to address you, with this elaborate personal preface, were it not for a profound conviction that the approaching election in this State is to be one of the most important, perhaps, the most important, of any which has ever been held within its borders. Important, not only as it may affect the honor and interest of the State, but deeply significant of good or ill to the nation, and to the hopes of constitutional liberty throughout the world. Unless something can be accomplished to stay the torrent of corruption which has recently been pouring in upon us like an overwhelming flood — unless a stop can be put to the utter perversion of constitutional principles, which has been increasing in certain quarters from day to day, for some years past — unless we can stand by the Constitution, at the same time that we stand by the Flag — we have, in my opinion, no reasonable prospect before us, except final disaster and anarchy, with perhaps a repetition of the horrible scenes of the French Revolution.

The portents of the times have long been ominous of evil, but the omens of the last few days are significant beyond those of any former period.

It was revolutionary in its character and corrupting in its influence, when the members of Congress usurped the functions of other regularly constituted authorities, in whom the power of appointing to offices was vested, (and who were

thus made constitutionally responsible that suitable persons should be selected to fill various offices), and by substantially parcelling out those appointments under their own patronage, made them the means of directly rewarding the services of those who had labored in their election, and of serving like bribes to others to induce them to help in their reëlection. We need Representatives — if we have them not already — who will not use the influence of their stations to subvert the proper power and responsibility of the several Departments, and who will moreover protest efficiently against such an abuse by others.

It was evidence of wide-spread corruption, when, upon its being ascertained beyond denial that a member of the Senate had prostituted his official station and influence, by procuring a contract so profitable that he was to receive the enormous reward of fifty thousand dollars, the Senate failed to expel him with disgrace and ignominy. We want Senators who will not expose themselves to suspicion of connivance, by a neglect to use their efforts to vindicate the purity of that body. The most astonishing frauds have been perpetrated in contracts for warlike supplies. How many of these contracts have been obtained through official influence of members of Congress, and what compensation has been paid or promised for that influence, we shall never know to the full extent; but enough has been exposed already to show the necessity of a reform in this branch of the public service.

The Constitution of the United States forbids the several States to enter into any treaty, alliance, or confederation, or to enter into any agreement or compact with another State; and the spirit of the provision is in direct hostility to combination and agreements between Governors of States with each other, as Governors, representing their several States. Such combinations and agreements are not necessary for the protection of State rights, or the performance of State duties. There has been, and is, no necessity for caucuses of Governors, in order to a support, in their several jurisdictions, of a vigorous prosecution of the war; and there should not be any such combinations to coerce or press the President into any measures of any description. They are an unwarranta-

ble interference with his authority, assuming great weight and force from the official character of those who thus interfere, and still greater weight from their combined action; and they tend to shift the responsibility of action from the constituted head of the nation, to an irresponsible cabal. It is readily seen that they may be made the means of immeasurable and irreparable mischief. Yet caucuses of that character have been held within a few weeks; the purposes and consultations being kept secret. And the ostensible reasons for the gatherings being vague, and altogether insufficient, lead to a reasonable belief that they were not the real ones.

We need an officer in the Executive chair of the Commonwealth who, when his error in attending such unwarrantable assemblages is pointed out, will not attempt to maintain that they are right and proper, representing them as "private circles," and who will moreover not only scrupulously refrain from participating in such combinations in the future, but will strenuously discountenance them.

Whether the design of procuring the removal of General McClellan has or has not entered into the contemplation of the Governors who have heretofore assembled, that design is still entertained, and may yet be acted on. The "Boston Traveller" of the 27th instant, through its Washington correspondent, under the heading, "Why General McClellan is retained in command," states that the New York democratic politicians are desirous of a martyr, with whom to carry the November election, and that the President does not intend to gratify them, and so McClellan will remain in his position *for the present*. This calumny upon the President, that he retains McClellan in command because his removal would affect the New York election, leaving the inference that his removal will take place when the election is over, shows the intention still existing to insist upon that change as soon as a sufficient pressure can be brought to bear upon the President. And the conviction that the election of next week may do much, either to sustain that gallant officer, or to leave him to the tender mercies of his persecutors, may incite us to additional efforts to displace those who have long been inimical to him.

But the matters to which I have thus far alluded, sink into comparative insignificance, when we consider other recent events.

A convention, as you well know, held at Worcester, on the 10th of September, professing to represent the Republican party of Massachusetts, refused, notwithstanding the earnest entreaties of distinguished individuals, to pass a resolution to support the President in the prosecution of the war.

A call was issued, not long afterwards, for a convention of the people, irrespective of party, to be holden at Faneuil Hall, on the 7th of October, for the purpose of nominating candidates for State officers, and taking counsel together for the common weal.

On the 22d of September the President issued the proclamation of his intentions respecting the mode of carrying on the war after the 1st of January, which the ultra gentlemen who at Worcester refused to support him have affected to consider a proclamation of emancipation; and thereupon, with the zeal of new-born converts, they become fulsome in their laudation, and loud in the expression of their determination to support the President.

At the Convention on the 7th of October, some fifteen or sixteen hundred people assembled in Faneuil Hall. It is certainly no disrespect to any other Convention to say that this one comprised a body of men as respectable as any other ever assembled in the State; and in the course of the proceedings they Resolved unanimously, among other things, that — "We desire, above all things, with our chartered rights and liberties preserved, to conquer and subdue the rebellion. We make, therefore, no captious criticism of his [the President's] acts and declarations. We burden him with no party or partisan policy. We offer no *conditions* to our patriotism. We resolve that Massachusetts, with all her heart and soul and mind and strength, will support the President of the United States in the prosecution of this war to the entire and final suppression of the rebellion." The language of those who addressed the Convention was in accordance with this resolution.

Now it would seem that this explicit, express, and unani-

mous determination of the members of a Convention representing some three hundred towns, to give an unconditional support to the President in the prosecution of the war; whatever might be their private views respecting the right of the President to issue such a proclamation, or respecting its expediency or its actual effect; should have been hailed with delight by every true patriot, as conclusive evidence that whoever might be candidates, and whatever the result of the State canvass, Massachusetts would give to the prosecution of the war and the suppression of the rebellion, the united energies of her whole people. The Convention made no reservation indicating that their support depended upon the election of any of their candidates for office. But, for good and sufficient reasons, they declined to support Governor Andrew, and indicated no preference for Mr. Sumner, and thereupon it seems that the Worcester ultraists, who would not support the President without a proclamation, have determined, so far as in them lies, that all who oppose the reelection of those gentlemen shall not support the President even with a proclamation. With them, support of their candidates, not love of country, is the test of patriotism. They are bent upon division in support of the President and the prosecution of the war, and upon casting off from such support all who do not believe their candidates to be the infallible exponents of Republican principles, and the only men entitled to hold the offices for which they are nominated. Not only so, but there is no measure of denunciation which has been spared to cast obloquy upon the unconditional supporters of the President. Not only is no man admitted to be a supporter of the President unless he pledges himself to vote their State ticket, but all others are branded with disloyalty. Loyalty is made to consist in allegiance to Messrs. Sumner and Andrew, and not to the country. If there are any persons who doubt the President's constitutional right to issue a proclamation of emancipation, and therefore cannot actively support it, consistently with the oaths they have taken to support the Constitution; if there are any who have looked to the final success of the war only through the reconstruction of the State governments, and the organization of a local force under those

governments to overcome the universal guerrilla warfare which is threatened in case the army of the rebels is broken up, and who think that no such reorganization can take place if the war is prosecuted on a basis which subverts the State authority, and thereupon believe that a proclamation of emancipation is inexpedient as well as unwarranted, because its tendency is directly to promote the success of the rebellion instead of its suppression; all such persons are to be branded as traitors, notwithstanding they are ready to pledge all their energies and means to a most vigorous prosecution of the hostilities, irrespective of their opinions, in the hope that the policy in which they do not and cannot believe, may not prove to be so disastrous as their own reasoning represents it.

A few days after the People's Convention in Faneuil Hall, the *Reverend* H. M. Dexter delivered one of what is called the Fraternity Lectures. These lectures call together the more eager and ultra of the fanatics of Massachusetts. Senators and Representatives attend. I pray you to mark the name "*Fraternity*," and then to recall, or if the circumstances are not fresh in your memory, to read some account of the atrocities committed under the name of "*Fraternity*" in the French Revolution. The reverend gentleman, I believe, is one of that class of "all-sufficient, self-sufficient, insufficient" clergymen, who not only think that they know more of constitutional law than William Pinkney and Daniel Webster ever did; but who also evince a strong belief that they know more than God does — that they could create a better world than He has made — and could govern the present one, bad as it is, better than He does; and they, of course, affiliate with those who want "an anti-slavery Bible, and an anti-slavery God."

I need hardly say that I respect and reverence the clergyman who gives evidence that he duly appreciates the high and holy nature of his mission. And I do not deny to him the right, at the proper time and in the proper manner, of discussing important political principles. But when a clergyman assumes to know more of Constitutional law than those who have spent their lives in the investigation of its principles, he is apt to exhibit himself as an unmitigated ass; and

when he makes a political prostitute of himself, pandering to the lusts of a political party, he is entitled to no greater respect than—other persons who disregard their duties. Hardly so much, as the iniquity he commits may be more extensively pernicious.

On the occasion of this Fraternity lecture, the "Daily Advertiser" reports that the reverend gentleman "spoke of the People's party in terms of contempt," and said, "The end of the People's party would be a rope's end, as it would of all who strove to thwart the onward march of liberty." Perhaps His Reverence will begin to think that this was a mere jest of his; but such jests in revolutionary times are apt by and by to smack very much of earnest. It might be regarded as an ebullition of the spleen of a fanatic, were it not that it has been followed up by other significant utterances from higher quarters.

In this connection, permit me to recall to your notice the declaration of Mr. Senator Sumner, in an address to the people of Lynn, that the People's Convention and the Democratic Convention were "nothing but the guerilla bands of Jefferson Davis." And, without extending this letter by citations, I refer you to the reiterated denunciations by ultra orators and ultra newspapers, of all who differ from them respecting the principles of Constitutional law, as "sympathizers with rebellion" and "traitors;" and this merely because they are of opinion that a proclamation of emancipation, while it is of doubtful legality, cannot effect anything of importance except where the war is actively prosecuted by bullets and bayonets; and that where it is thus prosecuted, emancipation will be effected without a proclamation. The "Cambridge Chronicle" of Saturday last pithily expresses this matter thus: "Emancipation proclamations, though they may be efficient when roads are passable, go for nothing when locomotion is interrupted."

These denunciations are but the premonitory symptoms of what we may witness of a more malignant type, and intensified in utterance and action, if Massachusetts fails to do her duty, in support of free speech, at the coming election. They are made all the more ominous by declarations from various Republican quarters, substantially, that we are

Hereafter to have no Constitution in the prosecution of the war. The cry comes from orators and presses, "let the Constitution go, and save the country." But what is the "country" which is thus to be saved by cutting loose from the great charter of our National Union. The "country" to be saved is not the land, not the men and women, but our political institutions. If we expect to save the country by producing a state of anarchy, we shall only encounter disappointment.

The President of that Worcester Convention which declined to support the President of the United States, in a recent address, represented the purpose of the meeting he addressed to be the support of the proclamation, [not of the President, or the war, or the country,] which was to be justified by considerations of military necessity. "He inquired what there was about the war that was constitutional;" and said that "to all allegations of unconstitutionality, the answer was that it was a military necessity."

The President of the "Third District Republican Convention" is not to be outdone in this race of revolution. He says: "Don't let the traitors so entangle us in the meshes of the law as to bind loyal men hand and foot, and then break down the Constitution and conquer us at last! Do not let the *forms* in which our precious legacy of liberty is enveloped, crush and destroy liberty itself." That is saying, in substance, Don't let the Constitution prevent us from doing what we wish to do! And he adds: "Whoever supports the President supports the proclamation: whoever is against the proclamation is against the President, for it is no longer a measure of mere policy,—it is in effect, though not in form, a military order." And then comes the significant addition, that "Congress cannot prevent the exercise of his supreme military command."

These are but samples of the utterances of ultra orators, and ultra presses, from day to day. The political atmosphere is poisoned with them. Let me commend them to your profound consideration. If such doctrines are to be sustained, the only security that we have for free speech, or any other political right, here in the Northern States, is in the fact that the Presidential chair is occupied by Abraham Lincoln.



The Republican party of Massachusetts are doing all that lies in their power to prostrate the liberties of the country. Forgetting the revolutionary memories of Charlestown, and Cambridge, and Roxbury, and Dorchester, and Boston, — within the military lines manned by our Fathers, under the command of Washington, — at the foot of Bunker Hill, and within the walls of the old Cradle of Liberty, — they are voluntarily making an ignominious surrender of the principles which lie at the foundation of a free government; and under the plea of necessity, always denounced as the odious plea of tyrants, they have dug the grave of the Constitution. For the purpose of emancipating the slaves of the South, (four millions if you please,) for whose slavery they are in no way responsible, they are sacrificing the liberties of twenty millions of Northern freemen. Do you doubt this? Let me turn your attention again to the speeches of the prominent orators of the party, and especially to that of the President of the "Third District Republican Convention," now perhaps most lauded by the Republican papers.

They tell you that the President, under the war power of the Constitution, has the right to do whatever is required by any military necessity. They aver that he is the sole and final judge of what is required by such military necessity. They say that the forms of the Constitution must give way to the proclamation, which of course is the substance. They add that the proclamation is in effect, though not in form, a military order. They make the military order of the President the supreme law of the land. And they say finally, in so many words, that "Congress cannot prevent the exercise of his supreme military command"!!! And all this is called Constitutional!!!

Do you not see that on this doctrine Congress cannot even make peace, if the rebels will submit, except at the sovereign pleasure of the President, and by his permission! Do you not perceive that the President is not only a monarch, but that his is an absolute, irresponsible, uncontrollable government; — a perfect military despotism. It matters not what you call your ruler if you invest him with such absolute, unlimited authority. Do you suppose that France would be a republic, if Louis Napoleon was styled President instead of

**Emperor.** Do you think that Constitutional freedom would exist in Turkey, if the Sultan were to assume the title of Governor. Have you the credulity to believe that your liberties are preserved, when your Constitution becomes a mere form and the governing power is despotic!

**You** may say that you have no fears of Abraham Lincoln. **Be** it so. But if the *forms* of republican liberty survive his day, and a Republican successor fills the Presidential chair, with such principles of constitutional law, and such unlimited power; what assurance have you, I ask, that he will not "recognize" the fact that war exists between the United States and Great Britain, or some other nation; order the army and the navy to enter upon active hostilities, and then, — assuming that a military necessity requires the suppression of free speech, and free suffrage, in New England, — issue his supreme constitutional military order, that such dangerous and traitorous proceedings be no longer permitted and that all who attempt to disobey the imperial mandate shall forthwith suffer the penalty of treason?

**I** say to you, that, on the doctrine assumed by the Republican ultraists, he would have a constitutional right so to do; for on that doctrine, whenever a war occurs, the Constitution abdicates in favor of any military order which the President sees fit to issue. It commits a constitutional suicide, and there is no resurrection except at the pleasure of the reigning monarch, whom it would be treason to oppose until he sees fit to lay down his power.

**Why** is it that you honor and reverence your flag? It is because it is the symbol of your freedom. Its glorious stars and stripes represent the union of free States, under free principles and constitutional safeguards. Whenever that "standard sheet" shall cease to be the emblem of a free government, its glory will have departed.

**Fellow** citizens, do not deceive yourselves. The issues of the pending election are not merely whether one man or another shall be elected Governor or Senator. Men are but the representatives of the principles which they sustain. The issues are, whether, heedless of the blood spilt at Lexington and Concord and Bunker Hill, and the free principles in defence of which it was shed, — whether, regardless of the an-

cient glories of the Commonwealth, derived from her defence and support of those principles,—whether, forgetting the memories of our Fathers, who have transmitted to us the priceless inheritance of freedom,—we will renounce those principles, and that inheritance, and, voluntarily and tamely, trample our liberties in the dust?

Very respectfully,

Your obedient servant,

**JOEL PARKER.**

CAMBRIDGE, October 30th, 1862.

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**Constitutional Law and Unconstitutional Divinity.**

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**LETTERS**

TO

**REV. HENRY M. DEXTER.**

AND TO

**REV. LEONARD BACON, D. D.**

**By JOEL PARKER.**

**CAMBRIDGE:**  
**PRINTED BY H. O. HOUGHTON.**  
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1874, July 27.  
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of Cambridge.  
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MEMORANDUM. — A letter, addressed "To the People of Massachusetts," in the course of the canvass for the election of State officers, in October last, contained these paragraphs, to wit:—

"A few days after the People's Convention in Faneuil Hall, the Reverend H. M. Dexter delivered one of what is called the Fraternity Lectures. These lectures call together the more eager and ultra of the fanatics of Massachusetts. Senators and Representatives attend. I pray you to mark the name '*Fraternity*,' and then to recall, or, if the circumstances are not fresh in your memory, to read some account of the atrocities committed under the name of '*Fraternity*' in the French Revolution. The reverend gentleman, I believe, is one of that class of 'all-sufficient, self-sufficient, insufficient' clergymen, who not only think that they know more of Constitutional law than William Pinkney and Daniel Webster ever did, but who also evince a strong belief that they know more than God does — that they could create a better world than He has made — and could govern the present one, bad as it is, better than He does; and they, of course, affiliate with those who want 'an anti-slavery Bible, and an anti-slavery God.'

"I need hardly say that I respect and reverence the clergyman who gives evidence that he duly appreciates the high and holy nature of his mission. And I do not deny to him the right, at the proper time and in the proper manner, of discussing important political principles. But when a clergyman assumes to know more of Constitutional law than those who have spent their lives in the investigation of its principles, he is apt to exhibit himself as an unmitigated ass; and when he makes a political prostitute of himself, pandering to the lusts of a political party, he is entitled to no greater respect than — other persons who disregard their duties. Hardly so much, as the iniquity he commits may be more extensively pernicious.

"On the occasion of this Fraternity lecture, 'The Daily Advertiser' reports that the reverend gentleman 'spoke of the People's party in terms of contempt,' and said, 'The end of the People's party would be a rope's end, as it would of all who strove to thwart the onward march of liberty.' Perhaps His Reverence will begin to think that this was a mere jest of his; but such jests in revolutionary times are apt by and by to smack very much of earnest. It might be regarded as an ebullition of the spleen of a fanatic, were it not that it has been followed up by other significant utterances from higher quarters."

Mr. Dexter thereupon addressed a letter to the writer, in "The Congregationalist," to which the first letter in this collection is a reply. The others have followed for the reasons indicated in them.

Although some portion of the contents is of temporary interest only, the discussions respecting the Constitutional Relations of the States and the United States, and the powers of the President, are not of that character; and the importance of these topics may serve to justify a compliance with the wishes which have been expressed, that the letters should be published in their present form. They appeared originally in "The Boston Post."

CAMBRIDGE, February 20th, 1868.

## LETTERS.

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TO THE REV. HENRY M. DEXTER,

*Editor of The Congregationalist, Pastor of the Berkley Street Church,  
Fraternity Lecturer, &c., &c.*

No. 1.

SIR,— I am in the receipt of that compound mixture of political piety and partisan politics, "The Congregationalist" of the 7th instant, containing your letter to me, dated on the 3d.

If you entertain a supposition that my reference to you, in the letter which I lately addressed "to the People of Massachusetts," was written in "hasty wrath," or indicated any "loss of temper," I beg of you to disabuse your mind of that idea with all possible expedition. You may rest assured that all which was there said was a deliberate, well-considered utterance, of the propriety of which I was then fully persuaded, and have not since entertained a particle of doubt; and I am too old to give any hope that I shall live to repent.

I designed to strike at an offence which has been committed too often, and at an evil which has existed too long without any sufficient rebuke; and that you presented yourself as a representative of the offenders to receive the blow, you may thank your Fraternity lecture.

The offence to which I refer is that committed by a certain class of clergymen who assume, in their public discourses and writings, not only to settle, *ex cathedra*, questions of Constitutional law, as if they were the final expounders of the construction of the Constitution, but who have the superlative impudence which leads them to sneer

at the opinions of Daniel Webster and Judge Curtis on Constitutional questions. This is not only an offence against good manners, but it becomes an evil, by giving rise to new and unfounded dogmas, to false reasonings and conclusions, and to loose Constitutional notions in the community, at a time when there should be no tampering with our Constitutional rights and duties. I know you only as one of these offenders, and deal with you accordingly. You are, it seems, prominent among them, and a suitable representative, therefore, through and by whom a proper admonition may be given. As to the manner of administering the rebuke, your taste and mine may differ. I have only to say, that it was intended to be conveyed in terms which would fitly express my ideas on the subject, and in a manner which would represent, precisely, the exhibition which that class of clergymen seem to make of themselves. You have appropriated what I said of the class, as if I had said it of yourself, personally. I acquiesce in the propriety of the appropriation. You have also appropriated a part of my remarks which neither specified you nor the class. For that I am not responsible. It was Gerrit Smith, and not you, who said, "Let the Constitution go, and save the country." Others have made use of similar language.

The occasion of my reference to you, and the class, was the report of your Fraternity lecture. My reference was only to the report in "The Daily Advertiser." Another report represented you as saying, substantially, that there was no doubt that the President had a Constitutional right to issue the Proclamation; and the general tenor of still another left no reasonable doubt, that whatever might have been your precise language, you were correctly reported in substance. Your previous course confirmed the report.

You seem to imply, rather than to assert, that I acted on insufficient evidence, thus impugning the report of the Daily Advertiser. The two points presented by that report were, that you "spoke of the People's party with contempt," and that you represented that "the end of the People's party would be a rope's end, as it would of all who strove to thwart the onward march of liberty." Now, Sir, permit me to say, that so far as you give a report of your lecture, you

fully confirm the faithfulness of the report of the Advertiser. You say that you "had been discussing the so-called People's party, and the possibility that they might not sustain the President's emancipation policy." In what terms of contempt you spoke of the People's party in that discussion, you do not please to inform us; but I understand that you are the editor of the *Congregationalist*, and in an editorial article contained in the number before me is this passage:

"In these elections, then, [the Fall elections,] as things now are, we repeat it, the rebellion reaches its climax. If the People's party in Massachusetts with its cordial, though in justice be it conceded *more rascally compeers* in New York and elsewhere, can succeed, there is every probability that the South will triumph and subjugate a divided North. If the party of the Government succeed, this movement of *treason* through the North will be rebuked," &c.

The italics are mine. They serve to point to the characteristics bestowed upon the People's party. You are presumed to understand somewhat of the force of language, and to know, therefore, that this extract contains an implied assertion of the positive rascality of the People's party in Massachusetts. Their compeers in New York, and elsewhere, are only "*more rascally*." The whole movement is characterized as one of "*treason*." This surely expresses something stronger than contempt, and leads to a reasonable belief that in your discussion you at least verified the report. What excuse have you for thus becoming "a political prostitute?"

As respects the other part of the report, we have your remarks *verbatim*; given, you say, as if in answer to an objector, who is made to remark: "And so you think there is danger, do you, that the People's party will not sustain the President—who is *the* Government?" And "What will the end be?" To which imaginary questions you answer: "Be? When you get to it, it will be a *rope's end* for them, or for anybody else who shall really and persistently attempt to thwart the onward march of liberty AND LAW." The italics and capitals are yours. The latter I suppose for the purpose of showing emphatically the addition which you made to what was reported in the Advertiser. The dramatic char-



acter which you saw fit to give to the passage is not material. The "*rope's end*," as the end of the People's party, is there, significantly, and for anybody else who shall really and persistently attempt "to thwart the onward march of liberty." Admit that you added "**AND LAW**," which you place in small capitals, as if that addition made an essential difference. Under some circumstances, and in some connections, it might do so. But what **LAW** do *you* refer to? Why, of course, to your law — your emancipation proclamation law. It is the onward march of that law, and the liberty connected with that law, of which you are speaking. That is the law that is "marching on"; not the law as expounded by jurists and commentators and courts of law. Law of this last description is not generally spoken of as having an "onward march." You are of opinion, are you not, that that law, like Gen. McClellan, is rather slow. You are not speaking of the law as expounded by any one who does not believe in that "higher law" which has lately been set up, practically, as above even God's law. Having faith in the opinions of clergymen competent to decide, I conclude that God has not seen fit to prescribe the rules of municipal law for the people of the United States; and that Jesus Christ has not done so; that the teachings of the Bible, to us, are personal, not municipal, nor political. It has remained for other clergymen to set up those teachings as a higher *municipal* and *political* rule than the written Constitution; and if the matter were merely speculative I might leave it to be settled by the clergy. But when the latter class, usurping God's authority, undertake to overrule the Constitution by the assertion of this higher political law — when they thereby inculcate unsound doctrine, not only in politics but in morals — when they endeavor to make the people, instead of a law-abiding, a law-breaking community, — and insist that the war shall be conducted on a basis which will greatly endanger, if not assuredly defeat its success, — it is quite time that they should be exposed, as the "all-sufficient, self-sufficient," persons, which they make themselves, and the "insufficient" personages which they really are. If any of them have D. D. attached to their names, that does not disqualify them from being also A S S, and mischief-makers besides.

You will say, perhaps, that it is undignified, to speak thus of dignitaries. I am almost inclined to admit it. But when one is striving to abate a nuisance, one must not stand on his dignity.

So much for the character of the charge, the proof of the facts on which it was founded, and the manner in which it was stated.

And now let me thank you for having kindly furnished, in the columns of your paper, full proof of the truth of the prominent characteristics which I attributed to the class of clergymen to which you seem to belong.

The remainder of your quotation from your Fraternity lecture not only shows, still further, your assumption of a superior knowledge of Constitutional law, but the mode in which you exhibit and prove that knowledge. It is in these words : —

“ These ‘ People’s party ’ men, some of them, are old men now, but they will all live to see the day when — *if they are loyal* — they will repent in dust and ashes of this attempt at a flank movement ; to see that there can be now but two honest parties in this land — they who maintain the Constitution and the Government with *entire fealty*, and with all their hearts, and they who, traitors at heart, desire their overthrow. Those few men who do honestly think that the President has gone beyond his power, will revise their judgment in the further light of *events*. They may be trusted at last, to reach the decision which Patrick Henry reached at first, and announced in the Virginia Convention of ’88, when he predicted that the time would come when Congress would search the Constitution to see ‘ if they have power of manumission. And have they not, Sir ? Have they not power to provide for the general defence and welfare ? May they not think that these call for the abolition of slavery ? May they not pronounce all slaves free, and will they not be warranted by that power ? This is no ambiguous implication, or logical deduction. The Constitution speaks to the point ; they have the power, in clear, unequivocal terms, and will clearly and certainly exercise it.’ ” — [Elliot, Debates of Virginia, vol. iii. 590.]

You subjoin : “ *This* is what I said,” and you close with these words, addressed to me : “ If *you* cannot say it — so much the worse for you.”

Now, Sir, before examining your law, let me ask : Did

you or did you not, in thus speaking of the action of the "People's party men," as "*this attempt at a flank movement,*" intend to imply that the rebellion was the movement in front, in aid of which this movement in Massachusetts was an attack upon the flank of the Government, and thus to give significance to your talk about "treason" and the "rope's end?"

And now, let us examine, *with reference to its law*, what you thus said, and what it is so much the worse for me if I cannot say.

In the first place there is the implication that you have settled the Constitutional right of the President to issue a proclamation emancipating all the slaves. Those men who "honestly" differ from you "will repent in dust and ashes," and "revise their judgment in the further light of *events*." What these "*events*" are, which will give the benefit of a Drummond light upon Constitutional construction, you do not say. But in this revision and reversal of opinion, through and by which they are to believe that the President has not gone beyond his Constitutional authority, they are to reach the decision which Patrick Henry reached, and which you quote from his speech. It may be presumed from the citation of volume and page, that you had seen the book, and that you know that Patrick Henry was, in the Virginia Convention, an earnest opposer of the adoption of the Federal Constitution, — that he used all the arguments which he could array, (not to say, conjured up all the bugbears which he could summon,) in order to create a jealousy of the powers proposed to be conferred on the new Government to be created by it. You should be presumed to have read some of the pages immediately following your extract, in which this very doctrine was denied by Governor Randolph; and to know, that notwithstanding the jealousy of Virginia for State rights, and notwithstanding Mr. Henry's opposition, the Constitution was adopted by that Convention, (which, by the way, it never would have been if his speech quoted by you had been supposed to give a true construction,) and you must also be presumed to know that this construction was not only thus substantially overruled at the time, but that it has never been received as sound from that day to

this; and that for a quarter of a century, more or less, no one, with any reasonable pretension of a right to be outside of an insane hospital, has attempted to sustain any such doctrine.

Furthermore: You adduce this extract to support your opinion that the President has a right under the war-power to emancipate by proclamation, whereas the right which Patrick Henry asserted, supposing it to exist, would be in no way dependent upon the existence of a war, and by the explicit language which you have quoted, it appears that he asserted the right to be in Congress. There is not in the whole passage a single word which in the most remote degree asserts any right or power of the President in relation to the matter. You place his assertion, "THEY HAVE THE POWER," in capitals, at the same time that you produce the extract to prove your Constitutional conclusion that the President has it. This is a specimen of your Constitutional law, and your Constitutional arguments. It certainly appears that you have not sufficient knowledge of legal Constitutional principles to perceive that the extract upon which you rely, if it were worth anything, would disprove your theory, by showing that Congress had the power, and not the President. This is the stuff which you retail in Fraternity lectures, and it is on opinions thus formed, and thus sustained, that, in another editorial, in the same paper, you have the effrontery to misrepresent and slander other men, after this fashion:—

"An attempt is making in various quarters to weaken the popular enthusiasm in the position assumed by the President in his emancipation proclamation, by arguing that he lacked the Constitutional power to issue it; and, in fact, to undermine the people's confidence in all the war-measures, on the ground that the rebels have some vague Constitutional rights which somehow hamper us in all our attempts to subjugate them, while there is nothing in the same Constitution which in any manner interferes with their plans to subjugate us. We are sorry to see some eminent men lending the weight of their names to the emission of such direful folly and treason. And we have been much astonished to find Mr. Justice Curtis writing a pamphlet to aid and comfort the rebels, by pushing, with all his might, such heresies."

And then, with consummate arrogance, you speak of "the

mournful fallacies of the unfortunate Judge." This is said of Judge Curtis, a gentleman known throughout the country, and abroad, as one of the most distinguished jurists in America. There is no court in the country, which has any regard for its own character, which would not listen with profound respect to the arguments of Judge Curtis. The Supreme Court of Massachusetts hearkens to no one of the able advocates who throng the bar of that court, with greater attention than to Judge Curtis. The Supreme Court of the United States pays a similar tribute to his merits. You yourself could laud his judicial learning and wisdom, when his most able dissenting opinion in the Dred Scott case was promulgated, the conclusion of which you could comprehend, although you were incapable of estimating the course of legal reasoning through and by which he arrived at the result. But now, when his legal opinion does not square with your self-sufficient notions of Constitutional law, formed on no legal basis, you can misrepresent the course and tendency of his argument, affect to lament the "direful folly and treason" of eminent men, express your astonishment to find him "writing a pamphlet to aid and comfort the rebels," and talk of "the mournful fallacies of the unfortunate Judge." What right have you to expect that reasonable people will write to, or of you with any expressions of respect, when you are in the habit of speaking in terms similar to those above quoted of the legal arguments and opinions of all persons from whom you, in the superlative eminence of your legal lore, choose to differ?

I trust that you have enough of a sense of shame yet left to make your cheeks tingle as you read this exposure of your utter incapacity to deal with a grave Constitutional question, and of the effrontery of your assumption of a right to sit in judgment upon the legal opinions of Judge Curtis, and to talk of his mournful fallacies. If this is not "pandering to the lusts of a political party," I am at a loss where to look for an example of it.

This impudent assumption, by clergymen, of a knowledge of Constitutional law, superior to, and entitling them to overrule the opinions of those who have been educated to the profession, is a nuisance, which has existed quite too long

upon sufferance ; but when it is coupled with denunciations of all lawyers who express opinions different from those of such clerical experts, as "traitors," "disloyal," "guerillas of Jeff. Davis," "giving aid and comfort to the enemy," the nuisance becomes intolerable, and I design to exert my humble efforts to abate it, in aid of which purpose I invite your further correspondence.

"*Sum cuique*," as you say.

"With due respect," also.

CAMBRIDGE, Nov. 11, 1862.

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TO THE REV. HENRY M. DEXTER.

No. 2.

SIR,—I was desirous of seeing what justification or excuse you might be disposed to give for your assumption of a right to pronounce judgment upon questions of Constitutional law, upon lawyers and their opinions, and upon the participators in the People's movement in the late election, branding them, so far as you could, as traitors giving aid to the rebels ; and, especially, I wished to be advised by what process of reasoning you would support your position that the President had the power, by proclamation, to emancipate all the slaves in the States where ordinances of Secession have been adopted, and therefore solicited your further correspondence. You favor me with your reply of the 18th inst., and at the same time decline the honor, from which I understand that this is the last communication with which you will favor me. I am inclined not to regret it, because in relation to yourself there is probably little further to be said beyond what may be said at the present time.

My design in the paragraph which has given rise to this correspondence, and in my part of the correspondence itself, has been to rebuke the unwarrantable assumption by a certain class of clergymen of a knowledge of Constitutional law superior to that possessed by lawyers, and which entitled

them to pronounce *ex cathedra* upon Constitutional questions, to sneer at and abuse those who differed from them, and to brand them as traitors, sympathizers with the rebellion, and other hard names of that character, merely for the expression of their legal opinions.

You make no attempt to sustain the Constitutional law of your Fraternity lecture, nor to justify your outrageous assault upon the "People's party" in that, and in your editorials, except by referring to the election returns, and your assumption that the People's movement gave aid and comfort to the rebels. In relation to the first, I have only to say, that the result justified none of the abuse and misrepresentation by and through which that result was in a great measure obtained. If a witness, indicted for perjury, should allege in defence, that the jury gave a verdict in favor of the party for whom he and others like him swore upon the trial, it would hardly be regarded as a sufficient answer to the evidence of the false swearing.

In regard to the charge that the People's movement gave aid and comfort to the rebels; assuming the fact to be so, it was because you and your compeers, fearing that your favorite candidates would not be elected in a fair open canvass, thought it expedient to bear testimony that the People's party were "guerillas of Jefferson Davis," "traitors," &c. Possibly the rebels did not know any better than to believe your assertions upon that point. So far as the members of the People's party were permitted to speak for themselves, the speech expressed the most decided and persistent hostility to them.

But you turn upon me, in a mere personal attack. You quote from my letter this sentence:—

"This impudent assumption, by clergymen, of a knowledge of Constitutional law, superior to, and entitling them to overrule the opinions of those who have been educated to the profession, is a nuisance, which has existed quite too long upon sufferance; but when it is coupled with denunciations of all lawyers who express opinions different from those of such clerical experts, as 'traitors,' 'disloyal,' 'guerillas of Jeff. Davis,' 'giving aid and comfort to the enemy,' the nuisance becomes intolerable, and I design to exert my humble efforts to abate it."

Professing to confine your reply to the point there made, you say:—

“If I understand it, you assume for yourself, and for the profession to which you belong, a monopoly of all knowledge of ‘Constitutional law,’ and you particularly avow that it is an intolerable nuisance, which you design to abate, that clergymen should presume to have, or to utter any opinions of their own upon Constitutional questions unless those opinions happen to square with those of ‘the profession.’ You especially think that my ‘cheeks ought to tingle’ with shame, because I have had the ‘effrontery’ to differ from Mr. Justice Curtis.”

Now if you *do* understand it, here are, in this short paragraph, three assertions directly contrary to the truth. *First*,— You know, or ought to know, that I do not assume, and have never assumed, any such thing for myself, or the profession to which I belong, as a monopoly of all knowledge of Constitutional law. What I have claimed for the profession and myself, is a right to form and express opinions upon Constitutional law without being overruled *ex cathedra* by a class of pretentious clergymen, having those opinions sneered at as the results of old fogysm, and ourselves denounced as traitors because of those opinions. This is no assumption whatever. *Second*,— You know, for you had the paragraph before you and extracted it, that the “intolerable” nuisance which I designed to exert my humble efforts to abate was, not that clergymen should presume to have or to utter any opinions of their own upon Constitutional questions unless those opinions happen to square with those of the profession,—against which I never uttered a word,—but the nuisance was precisely as described in the extract, an “impudent assumption by clergymen of a knowledge of law superior to, and entitling them to overrule the opinions of, those who have been educated to the profession;” which became intolerable when coupled with denunciations of those lawyers, from whom these clerical experts differed, as “traitors,” “disloyal,” “guerillas of Jeff. Davis,” “giving aid and comfort to the enemy.” This neither expresses or implies any denial of a right on the part of any clergyman, or any one else, to have and to utter any opinions which he



pleases upon Constitutional law. *Third*, — You know, that in my reply to your letter I expressed no opinion that your cheeks ought to tingle with shame because you have had the effrontery to differ from Mr. Justice Curtis. It was “the exposure of your utter incapacity to deal with a grave Constitutional question,” and “the effrontery of your assumption of a right to sit in judgment upon the legal opinions of Judge Curtis, and to talk of his mournful fallacies,” that I thought ought to make your cheeks tingle. Accusing Judge Curtis of “writing a pamphlet to aid and comfort the rebels, by pushing with all his might such heresies,” and saying that Prof. Parsons’s communication in the Daily Advertiser “explodes the mournful fallacies of the unfortunate Judge,” is something more than differing from Mr. Justice Curtis. You say in another part of your letter, “I did speak of the mournful fallacies of Judge Curtis’s pamphlet. I thought it. As a citizen I had the right to say it — respectfully, as I did.” You most surely have strange ideas of *respect*. There is no “*respectfully*” in any part of your notice of it, either in words, or manner, — in form, or substance. Whether you are singular in your opinion is not the question. I have not undertaken to discuss that; but I may say that neither the President, nor many members of the public bodies you name, would exhibit their respect or courtesy by similar remarks respecting Mr. Justice Curtis, and his opinions.

Again, you say, “Now the question is, whether I, as a citizen — though a clergyman and an editor — have not as much right as you or your colleague can have, to express an opinion on this same matter, which is practical alike to all.” Permit me to say that the question is no such thing. You enter into an elaborate defence of your right to form your own opinions, to express them, and to vote as you think fit. You know, or ought to know, that I have never denied that right. With respect to all that you say about a clergyman’s sharing the rights and duties common to other citizens — of the right of any citizen to study for himself all interests involved in the election, to form his own judgment, and to vote as he pleases, I have no controversy whatever. I have never denied any of these rights, and shall not begin to do so now. I admit the right of all persons, — clergymen of course

included, — to express their opinions upon proper occasions, and in a suitable manner, with a view of inducing others to adopt the same opinion. I call no man a traitor because he votes differently from what I do. That is reserved for you and those like you, who assume the right to determine how men shall vote, or be denounced for exercising the freedom of their own wills. I do not accuse large bodies of men of flank movements in aid of the rebellion, and of giving aid and comfort to the rebels, even if they sustain by their votes the cry for universal emancipation, by a proclamation, although I have an undoubting opinion that there is no authority in any branch, or all the branches of the United States Government, to do any such thing; and I believe, (though I do not assume that familiarity with the rebel councils that you claim to possess,) that nothing would gratify them more than a *paper* attempt at emancipation — emancipation of the slaves of the loyal, as well as the disloyal — because nothing would serve better to unite them in a determination to fight to the uttermost, on the plea that such an attempt was, or would be, inconsistent with the Constitutional rights of the several States; — which they do not need anybody at the North to tell them.

Again. I find in your letter the following sentence: “Allow me to say, that for you now, simply as a lawyer, to declare that the people of these United States cannot understand the Constitution which they have made without coming to you to find out what it means, and what they may do under it, is an ‘arrogance’ and an ‘impertinence’ and an ‘effrontery,’ quite equal to anything of which you assume any clergyman ever to have been guilty.”

I cannot allow you to say any such thing, because it implies, as you well know, that I have, in some form, substantially made such a declaration; which you either know, or ought to know, is an implication without the least foundation. This kind of argument, — assuming that pretensions have been set up, which were never even thought of, — which is worthy only of a pettifogging lawyer in the lowest purloins of criminal jurisprudence, will not serve your purpose.

Finally. In reply to my question whether, in speaking of

*this flank movement*, you intended to imply that the rebellion was the movement in front, in aid of which this movement in Massachusetts was an attack upon the flank of the Government, and thus to give significance to your talk about "treason" and the "rope's end?" You say, "I *did* mean 'to imply' just that."

You stand convicted, then, by your own declaration, of a deliberate intention to charge those engaged in the "People's movement" with the *crime of treason*. You know that a flank movement *in aid* of the movements of the rebels in front, is, of course, either by the enemy, or by an ally of the enemy. It is a direct participation in the war. It is as treasonable as the movement in front, having the same general object and purpose. And you meant deliberately to charge this upon large numbers of the people of Massachusetts. If there is a depth of political prostitution lower than this, you will probably sound it yet, but I am not just now advised what it can be. It will not do to say that you accuse no member of the People's party of the *intent* to commit treason in action, for there can be no such *flank movement in aid*, without an intent; and there is no treason without an intent either express, or at least implied from the circumstances.

If you are content to stand before the people in the position in which you have thus placed yourself, I am content to leave you there.

With *due* respect, as before.

CAMBRIDGE, Nov. 22, 1862.

TO THE REV. LEONARD BACON, D. D.,  
NEW HAVEN, CONN.

No. 1.

SIR, — I have undertaken the performance of a duty which some one owes to the profession of the Law, and to the community generally ; and the obligation rests upon me, perhaps, equally with others. It is the duty of vindicating the right of the gentlemen of the Bar to form their opinions upon legal subjects, and especially upon the construction of the Constitution of the United States, and to express those opinions in any manner consistent with due courtesy to others, without being subjected to censure, sneers, abuse, and vituperation, by a class of clergymen who assume to know more of Constitutional law than the tribunals and officers created and constituted for the purpose of discussing and determining legal questions. So long as this assumption by clergymen was confined to dogmatic opinions, sneers, and mere censure, it might be, and was in a great measure, overlooked ; but when, as has lately been the case, clerical gentlemen have proceeded to denounce lawyers who differ from their notions of Constitutional law as "disloyal," "sympathizers with the rebels," "traitors," &c., the matter assumes a more grave aspect ; and it becomes important that the pretensions of this portion of the clergy to a better knowledge of the rules by which the meaning of the Constitution is to be ascertained should be fairly examined. This is not a mere matter of professional *esprit*. If the clergy really have the best set of rules by which to determine our Constitutional rights and duties, then those rules should be recognized, so that the construction of the different clauses of the Constitution, and of the powers of those who administer the government under it, may be as uniform as the nature of the case will admit. If, on the other hand, the mode of reasoning which this class of clergymen apply to the subject is altogether fallacious and inconclusive, leading to inconsistencies and contradictions, then it is quite time that it should

not be made the basis upon which the opinions of lawyers are to be depreciated and substantially overruled, and those who entertain the opinions denounced as the enemies of the government and of liberty.

I am fully aware that among the lawyers themselves there is a difference of opinion upon various questions of Constitutional law. But that is not at all material to the present inquiry, which has no reference to the differences of construction by different lawyers, but is, whether clergymen are entitled to pass final judgment, and overrule any and all lawyers with whom they differ on such subjects.

Connected with the inquiry, in the present instance, is another, to wit, — what are the reasons upon which this class of clergymen found their support of the Proclamation of Emancipation, as a measure authorized by the Constitution?

In pursuit of the object above indicated, my studies, for a few days past, have been somewhat more than usual within the columns of "The Congregationalist;" and I find in the number issued October 31, certain "*Views from a Watch Tower*," respecting "the Great Proclamation." The contents of the article seem to place it within the scope of my inquiries; and an editorial note in another column says, "Many of our readers who for several weeks have been looking for Dr. Bacon's views of the Proclamation, will find them given at length in the 'Watch Tower' column." I address this letter therefore to you.

You say, in the outset, that you "have not been in a hurry to give out your thoughts on the President's great Proclamation," and that what you say in the article "is the result of some deliberate thinking." The matter is of course entitled to a more grave consideration than it would have been had you been "among those who spoke first," in which case, as you well say, you "might have spoken inconsiderately."

Having endeavored with some care to ascertain the "Views" expressed after such deliberation, it appears that, so far as they are material to the present purpose, they may be summed up as follows:—

1. That—

"The proclamation is made at a time when its necessity, as a war measure for the preservation of the Union, can no longer be doubted

by any man truly loyal to the Constitution. The long delay, whether wise or unwise, *has made the necessity too manifest to be disputed, except by those who have so long paid a debasing homage to slavery, for the sake of 'saving the Union,' that they are now willing to sacrifice the Union for the sake of saving slavery. All such persons, South or North, are in fact disloyal to the Constitution.*"

2. That—

"The time has come when all men are compelled to see that *either* the Union must be broken up; *or*, the rebel States must be brought back by the concession of great Constitutional changes adverse to liberty, and to the principle of government by majorities; *or*, the war must be indefinitely prolonged; *or*, that policy must be adopted which recognizes the rebels, not as a political party, whose opposition to the government is a little irregular, and must be gently corrected, but as enemies to be destroyed. If such a policy is adopted, then the territory held by the rebels *must be recognized as hostile territory, to be conquered and reannexed.* If such a policy is adopted, the war against the rebels must be war in earnest, and we must cease to be hampered by any supposed necessity of helping the rebels against their own domestic enemies, *or by imputing any validity whatever to their laws for the enslaving of the negroes.*"

3. That—

"The proclamation is made at a time when everybody knows that *if the Union is to be saved, and the Constitution is to stand as it is, and if the war is not to be interminable, the preposterous policy which regards the enslaved as property, and property in slaves as preëminently sacred, must be abjured at once and forever.*"

4. That you—

"Cannot avoid the conviction that the *men who oppose the proclamation, and talk about bringing the war to an end in some other way, expect nothing else—and intend nothing else—than some concession to the rebels, which shall either divide the Union, or subvert the Constitution.*"

5. You say,—

"The proclamation, then, marks a definite stage of progress in the prosecution of the war. *Henceforth, the war is not merely a military demonstration, to put down a disturbance in certain districts, where the machinery of a legitimate government under the Constitution is supposed to be still in operation;—it is now the earnest reality of war to crush a powerful and desperate enemy,—to regain by conquest a wide territory, which has been wrested from the people of the United States, to whom it rightfully belongs,—to establish the Constitution and the laws of the Union in regions over which, at present, they have no more sway or force than they have in Patagonia.*"

## 6. You say —

"Concerning the Constitutional power of the President to issue such a proclamation, I have no shadow of a doubt."

## 7. You add —

"I am aware that some lawyers have undertaken to argue from the Constitution, against the right of the President to do what he has done in this respect."

## 8. And to the above you add, further, —

"But though a hundred lawyers should undertake to convince me that the government is restrained by the Constitution from defending its own existence in a civil war, *or that there is any one of the rights of a belligerent which it may not exercise in the territory of a State which has rejected the Constitution, and made war upon the Union*, they can never impose that absurdity upon me, nor upon any man who is not willing to abnegate his own common sense in favor of somebody else's professional sense."

## 9. To this is subjoined, —

"*I have a great respect for lawyers in their place*, but I must be permitted to remember that lawyership is not the same thing with statesmanship; and to insist that the Constitution of the United States, like the Bible, is to be interpreted by the common sense of the people."

## 10. You

"Find that though Congress has the right to *declare* war, the President alone has the right to *make* war."

## And thereupon you say —

"*To my common sense*, the right and the duty, to make war against the enemies of the United States, be they foreigners or rebels, involves, or rather *is* the right and the duty of conquering and crushing them by every legitimate method of war."

## You then inquire —

"Has the President a right by the Constitution, and is it his duty to wage war in South Carolina, — has he a right and is it his duty to bombard cities, to burn villages, to cut down groves and forests, to obstruct harbors, to turn rivers from their channels, and to mow-down regiments of men in battle, when these measures are necessary to a speedy and thorough conquest, — has he a right to do all this in defiance of the only government and laws now existing in that State, — and has he not a right to proclaim that, after a certain day, unless the people of that State shall in the mean time reëstablish a State Government under the Federal Constitution, no distinction shall be recognized among them but the distinction between friends and enemies of the United States, and that every friend, whatever his former condition, shall be recognized and protected as a freeman?"

Whereupon you exclaim —

“Shame on the law-logic which undertakes to mystify our common sense.”

11. You ask further —

“If the President, or a military commander, acting by his authority, may seize private property, when needed for military purposes — *if he may take cotton, provisions, forage, horses, and all sorts of cattle*, from the loyal as well as the disloyal — giving to loyal owners an assurance of indemnity hereafter; *may he not also take this property* with a like assurance of indemnity to loyal owners?”

12. You take a distinction : —

“Instead of proclaiming the universal and perpetual abolition of slavery in the United States, the President only offers freedom to certain slaves. This is correct. Abolition is an act of political sovereignty. Emancipation may be, and in this case is, a military necessity. *Meanwhile*, just as fast as our armies advance, and just as fast as slaves of rebel masters come within our lines, *the process of actual emancipation is going on under the acts of Congress*, and it could not be accelerated by any proclamation.”

13. Another distinction : —

“The President has no right to emancipate any slave on the ground that slavery is wrong, but he has a right, as Commander-in-Chief of the Army and Navy, to proclaim the emancipation of slaves on the ground that their emancipation is necessary as a means of crushing the rebellion.”

14. Is an admission : —

“Let it be remembered that the President of the United States is not an autocrat like the Emperor of Russia, he is a public servant, whose powers are strictly limited.”

The foregoing propositions are extracted from your article in your own words. I have preferred to give them in this mode, instead of abbreviating by an abstract, in order to avoid all cavil; and I have endeavored to give faithfully all your propositions which are material to the due understanding of your legal and Constitutional doctrines, omitting nothing which introduces any material qualification to what is above stated. Part of the *italics* are mine, for the purpose of calling attention to some of the more material portions.

The 7th, 8th, 9th, and 10th serve to mark your estimate of the opinions of lawyers in relation to the subject-matter, and the manner in which you see fit to place the profession before



the community. In the 8th, you misrepresent their opinions, by implication, in assuming that arguing "from the Constitution against the right of the President to do what he has done" is substantially an argument, "that the government is restrained by the Constitution from defending its own existence in a civil war," — a proposition, the truth of which, I think, no lawyer ever undertook to convince you, or any one else. It is certainly not embraced in an assertion that the President has no right, under the Constitution, to emancipate all the slaves in the Seceding States, by a Proclamation. A proclamation of general emancipation in the Seceding States is one thing, the defence of the government is another, and a very different, thing. And it is a false argument to reason as if they were identical, assuming in that way, that people have said what never entered into their thoughts.

The 9th proposition shows that you consider lawyers out of place in the attempt to discuss and determine the Constitutional questions which affect the right to issue the proclamation. You "have a great respect for lawyers in their place," but you evidently have no respect for them here, where the matter is to be determined by somebody's "common sense," (we will inquire whose, by and by,) and not by "law logic," upon which you cry "shame," because it "undertakes to mystify our common sense." And the 1st and 4th show, that not only lawyers, but all others who dissent from your views by doubting the necessity of the proclamation, are, in your opinion, "disloyal to the Constitution;" that they "have so long paid a debasing homage to slavery," "that they are now willing to sacrifice the Union for the sake of saving slavery;" and that they "*intend* nothing else than some concession to the rebels which shall either divide the Union or subvert the Constitution." You italicized the word "*intend*" to make it emphatic.

As you have thus chosen to place yourself before the public in a position of antagonism to all lawyers, and all others who do not concur with you in having no doubt respecting the right of the President to issue the Proclamation, branding them so far as you may with "*disloyalty*," "*debasing homage to slavery*," and with an *intent* "*to divide the Union or subvert the Constitution*;" I certainly cannot be charged

with a want of courtesy if I presume to examine, with entire frankness, your claims thus to sit in judgment upon the members of the profession, and all others with whom you differ respecting Constitutional law. Perhaps I use that term unadvisedly, for if the recent pretensions of a portion of the clergy are well founded, there would seem to be no longer any *Constitutional law*, that having been merged and swallowed up in *Constitutional divinity*.

The accusation, which you thus publish to the world, falls very far short of a decent civility. If it shall be made manifest that the pretensions to a superior legal wisdom are entirely unfounded,—the atrocity of your imputation of disloyalty, and of an intent to commit treason, will not be mitigated by the arrogance which, in that case, will appear to have prompted it.

Yours, &c.

CAMBRIDGE, Nov. 28, 1862.

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TO THE REV. LEONARD BACON, D. D.

No. 2.

SIR,— In my letter of the 28th of November I extracted from your "Watch-tower column," in "The Congregationalist" of October 31, certain propositions which appeared to present your "views" of the "great proclamation," and particularly your argument in favor of the Constitutional right of the President to issue it, involving of course a construction of the provisions of the Constitution by which it is supposed that authority for that purpose is conferred; for you admitted, in the extract which I numbered 14, that the President "is a public servant whose powers are strictly limited."

As you cry "shame on the law logic which mystifies our common sense;" assert that a hundred lawyers could not convince you, &c., and very distinctly imply that lawyers are out of place in attempting to ascertain the true construction of the Constitution, upon this subject, at least; I propose,

before proceeding to examine your argument, to consider the rules by which lawyers exercise this "law logic" in determining questions respecting the true interpretation and meaning of different parts of the Constitution and other documents; and to institute a comparison of those rules with the rule which you appear to regard as a much more safe and certain one than "law logic."

Blackstone says, —

"The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law."

He makes a short commentary upon each of these, as follows (omitting his illustrations): —

1. "Words are generally to be understood in their usual and most known significations; not so much regarding the propriety of grammar, as their general and popular use."

2. "If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word or a sentence, whenever they are ambiguous, equivocal or intricate."

3. "As to the *subject-matter*, words are always to be understood as having regard thereto; for that is always supposed to be in the eye of the legislator and all his expressions directed to that end."

4. "As to the effects and consequence, the rule is, that when the words bear none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them."

5. "But lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it, or the cause which moved the legislator to enact it."

Mr. Justice Story, in his "Commentaries upon the Constitution," has a chapter upon the "Rules of Interpretation." My limits will not admit of extensive quotations. A few extracts will suffice. He says, —

"The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties;" — "that in construing the Constitution of the United States, we are in the first instance to consider, what are

its nature and objects, its scope and design as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts. When its words are plain, clear and determinate, they require no interpretation, and it should therefore be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil."

He then proceeds to give rules applicable where the words are not plain and clear; and adds:—

"Where the words are unambiguous, but the provision may cover more or less ground, according to the intention, which is yet subject to conjecture; or where it may include in its general terms more or less, than might seem dictated by the general design, as that may be gathered from other parts of the instrument, there is much more room for controversy; and the argument from inconvenience will probably have different influences upon different minds. Whenever such questions arise, they will probably be settled—each upon its own peculiar grounds; and *whenever it is a question of power, it should be approached with infinite caution, and affirmed, only upon the most persuasive reasons.* In examining the Constitution the antecedent situation of the country, and its institutions, the existence and operations of the State Governments, the powers and operations of the Confederation—in short, all the circumstances, which had a tendency to produce or to obstruct its formation and ratification, deserve a careful attention. Much, also, may be gathered from contemporary history, and contemporary interpretation, to aid us in just conclusions."

"A power given in general terms is not to be restricted to particular cases, merely because it may be susceptible of abuse—and, if abused, may lead to mischievous consequences."

"On the other hand a rule of equal importance is *not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic or even mischievous.* If it be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment."

He closes his statement of some of the more important rules to be employed in the interpretation of the Constitution, by adverting to a few *belonging to mere verbal criticism*, the first of which is:—

"Every word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify and enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expres-

sion, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or juridical research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and *cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.*"

After divers observations upon the construction to be given to words which have different shades of meaning, and technical words, he says:—

"But the most important rule, in cases of this nature is, that a constitution of government does not, and cannot, from its nature, depend in any great degree upon mere verbal criticism. Such criticism may not be wholly without its use; it may sometimes illustrate or unfold the appropriate sense; but unless it stands well with the context and subject-matter, it must yield to the latter." . . . "That must be the truest exposition which harmonizes with its design, its objects, and its general structure." — *Story's Commentaries on the Constitution*, octavo edition, pp. 136, 137, 142, 144, 157, 161, 162.

Such are some of the most important rules long established and recognized by the most able jurists, by means of which the "law logic" upon which you cry "shame," attempts to solve legal questions, and to arrive at just conclusions.

On the other hand your rule of construction, by means of which the powers given by the Constitution are to be ascertained, is, I admit, of a different character. It is quite simple, if not quite certain. You state it as if it were the common sense of the people, but it appears to be your own common sense. That is to answer in lieu of all other rules, not merely to ascertain the meaning of words for which it might be admissible, but to settle all other questions which may arise respecting the Constitutional power of the President, at least. You say in the 9th extract that you must "be permitted to remember that lawyership is not the same thing with statesmanship; and to insist that the Constitution of the United States, like the Bible, is to be interpreted by the common sense of the people." But just afterwards you say, "I find," &c., and again, "I find," &c., and again, "I find," &c., and then you add, "*To my common sense*, the right and duty to make war against the enemies of the

United States, be they foreigners or rebels, involves or rather is the right and duty of crushing them by every legitimate method of war." It is quite evident that when you insist that the Constitution is to be interpreted by the common sense of the people, you mean that it is to be interpreted by the common sense of Dr. Bacon; and your reasoning is based upon that as your rule of construction. It is quite idle, if not something worse, to talk about a decision by the common sense of the people at large, in favor of the authority of the President to issue the proclamation. It is very apparent that no uninfluenced popular vote could exhibit the common sense of the people upon any question of Constitutional construction, and if the vote were to be influenced by persistent assertions that all whose opinions were adverse to the power of the President, had "so long paid a debasing homage to slavery for the sake of saving the Union, that they are now willing to sacrifice the Union for the sake of saving slavery;" and that all such persons "are in fact disloyal to the Constitution," the common sense of the people might be quite as much mystified thereby as by any "law logic" which could be presented to their consideration.

You have no expression of the common sense of the people, meaning thereby the expression of the popular will, upon the subject, and it is entirely deceptive to talk of a construction of the Constitution by such a rule. The popular meaning of words may ordinarily be found by a resort to the dictionaries, but popular conclusions are not recorded there. Individuals express their opinions, and a certain aggregation of "Views" may thus be obtained. But there is no mode of taking the opinions of the people at large on such subjects. There has been no action of the people since the proclamation was talked of, which can be supposed, even in a remote degree, to give the results of their common sense respecting the authority to issue it, unless it is to be found in the recent elections, and thus far it is decidedly adverse to your conclusions.

I proceed to an examination of the logic of your common sense as exhibited in the "Views" which you have furnished to the community.

One of your positions, in support of the right of the Pres-

ident to issue the proclamation, is, in substance, that the Government may exercise all the rights of a belligerent, in the territory of a State which has rejected the Constitution and made war upon the Union. Your phraseology is, that "though a hundred lawyers should attempt to convince me" — "that there is any one of the rights of a belligerent which it [the Government] may not exercise in the territory of a State," &c., "they can never impose that absurdity upon me, nor upon any man who is not willing to abnegate his own common sense in favor of somebody else's professional sense."

As these "rights of a belligerent" are offered to show that the proclamation might lawfully be issued, they are not of course acquired by or through the proclamation, but exist independent of it. If the Government has such rights, they date back to the commencement of the war. There has been, so far as I am aware, no time since the period when the Government brought its armies into active warfare, that it has assumed or acquired any rights as a belligerent which it did not possess, say at the first battle of Bull Run.

I suppose it may be understood that by "the rights of a belligerent," in this connection, you mean something more than the right to suppress an insurrection by forcible means, which means, from the magnitude of the rebellion, have assumed the proportions of war. In other words, you must intend that the Government has all the rights of a belligerent which would be recognized by the law of nations in a foreign war. Unless the proposition means that, it means nothing to the purpose of your argument. Whether, meaning that, it is to the purpose, we will consider hereafter.

I have no doubt that the Government, by acknowledging the Confederate States as a belligerent, as England and France have done, may assume to itself all belligerent rights. But I think it may safely be asserted, that there is no war, foreign or domestic, in which one of the parties is entitled to all the rights of a belligerent, as recognized by the law of nations, unless the other party is also entitled to the same rights. Practically, there cannot be a war in which there is only one belligerent; and it seems that there can be no war in which one of the belligerents can be recognized as having

all belligerent rights, and the other none of them. If we claim all these rights, we must concede them to the Confederates.

There may be an insurrection, and the Government may seek to assert its authority by force, in which neither party is entitled to the rights of a belligerent. The two parties might be, as they are in this case, belligerents so far as certain foreign nations are concerned, because of the recognition by such nations of the insurgents as a belligerent party. But, as between themselves, however grave the proportions of the contest, their *status* is as to each other, that of the preceding lawful authority asserting itself, on the one hand, and rebels attempting to produce revolution, on the other; and all acts of active hostility on the part of the rebels would be treason, and punishable accordingly. But when the Government itself, instead of pursuing its attempt to subdue the rebellion, assumes to itself the character of a belligerent, the rebels are the other belligerent, and there can be no new treason, subsequently, on the part of those who before were traitors. The acts of Congress for the punishment of treason by confiscation, &c., could no longer apply to subsequent acts, as between belligerents there is no treason in acts of hostility.

If the United States may exercise all the rights of a belligerent in the territory of a State which has rejected the Constitution and made war upon the Union, they may conquer the State, without doubt; and after the conquest treat it as a territory, and change its laws. And so, on the other hand, the State which has rejected the Constitution may, if it can, not only conquer the United States, (which is undoubtedly true even if the case was one of mere insurrection), but in the attempt so to do such State would only be exercising the lawful rights of the other belligerent; and if the attempt should fail, those concerned in it would only be subject to the common laws of warfare. The late incursion into Maryland was, on your position, lawful war; and no laws of the United States were broken by the forces concerned in it, so as to subject them to penalties. There are authorities which tend to support these positions, unless they are rejected as "law logic."



General Halleck, speaking of civil wars, says:—

“Wars of insurrection and of revolution are, in one sense, *civil* wars; but this term is more usually applied to those contests which are waged between rival families or factions, for party ascendancy in a State, rather than for its dismemberment, or for a radical change in its government. Each party, in such case, is usually entitled to the rights of war as against the other, and, also, with respect to neutrals. *Mere rebellions, however, are considered as exceptions to this rule, as every Government treats those who rebel against its authority according to its own municipal laws, and without regard to the general rules of war which international jurisprudence establishes between sovereign States.*” *Halleck's International Law and Laws of War.* Chap. 14, sec. 9.

Unquestionably, if an insurrection involves large numbers of people, and the hostilities thereupon assume the proportion and character of a grave contest of arms, the contending parties must, in the exercise of an ordinary humanity, do many things according to the recognized rules of war between independent nations, such as exchange of prisoners, &c. This will not be inconsistent with the assertion of the rightful supremacy of the existing Government over the rebels, and the right to treat their acts of hostility as treason. But in proportion as the ordinary laws of war between independent nations are applied to the existing hostilities, in that proportion the impropriety of regarding the case as one of mere rebellion, incurring the penalties of treason, will increase. If the Government, failing to suppress the rebellion, assumes to itself all the rights of a belligerent, it does, upon general principles, concede to the insurrectionary organization a *quasi* independent character. And Wheaton says:—

“A contest by force between independent sovereign States is called a public war. If it is duly declared in form, or duly commenced, it entitles both the belligerent parties to all the rights of war against each other.” . . . . “Whatever is permitted by the laws of war to one of the belligerent parties is equally permitted to the other.” *Wheaton's Elements of International Law.* Part IV., chap. 1, sec. 6.

If the United States should authorize letters of marque and reprisal against the insurgents, that would be a recognition of them as parties to a public war. If they should enter into a truce or armistice, which only suspends hostilities,

they would recognize them as a belligerent party capable of agreeing upon such a temporary or *quasi* peace; and could hardly after that claim a right to convict of treason for subsequent acts.

"If, however," says Halleck, "the conditions of the truce be broken by one belligerent, there is no doubt that the other may immediately resume hostilities without any declaration." *Halleck*, Chap. 27, sec. 9.

This clearly recognizes the parties to a truce as upon equal standing, thus far.

But your common sense, as you exhibit it in your "Views," tells you, and you tell the community, that we may exercise all the rights of a belligerent, at the same time that, "just as fast as our armies advance, and just as fast as the slaves of rebel masters come within our lines, the process of actual emancipation is going on *under the acts of Congress*," (see 12th extract,) as if they were still in force against rebels.

Would it not be well if your common sense were a little more consistent with general principles, and with itself?

In my next, I will consider your position respecting the right of the President to "*make war*," and respecting the "*conquest*" of the seceding States.

Yours, &c.

CAMBRIDGE, Dec. 5, 1862.

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TO THE REV LEONARD BACON, D. D.

No. 3.

SIR,— In my last letter I considered your proposition that the United States have, as against the rebels, all the rights of a belligerent, showing that such an assumption would concede to the rebels similar rights, as the other belligerent. If such rights exist, they date from the commencement of active hostilities, as there has been nothing since to change the character of the war in this respect. The proposition is, therefore, inconsistent with a right, in the United States, to

punish all acts of warfare by the rebels, as acts of treason—inconsistent, of course, with the confiscation act, which you regard as in full force; and inconsistent, moreover, with the introductory part of the proclamation itself, which declares “that hereafter, as heretofore, the war will be prosecuted for the object of practically restoring the Constitutional relation between the United States and the people thereof, in which States that violation is or may be *disturbed or suspended*.”

I proceed to examine next your statement, that you “find that though Congress has the right to *declare* war, the President alone has the right to *make* war.” See *Letter I*, 10th extract, This is, among other things, to show the right of the President to issue the proclamation. How it could avail to sustain the right claimed, if the fact were so, is certainly not apparent. Of that hereafter. The discovery is certainly of no small import. So far as I am aware, you are entitled to be chronicled not only as the first, but as the only person who has made this particular discovery, unless perhaps some patent lawyer may contest your right.

To a certain extent, doubtless, it is in accordance with the recent *Republican* dogma, that the President has a right to do whatever is required by the military necessity, and that he is the sole judge of what is required by the military necessity, thereby making the President, in time of war, a military despot. The differences however are so far material, that perhaps neither infringes on the other.

I fear that the discovery or invention, whichever it may be called, that the President alone has the right to make war, and whoever may be the first finder, will not prove a useful one. I deny entirely that you have found any such thing in the Constitution. If the fact were so, then all the interference of Congress in the making of war would be a usurpation of the Constitutional right of the President and would of course be unconstitutional. I have no doubt that very much of the interference of Congress in the making of the present war has been essentially mischievous, and has retarded, rather than promoted, its success; but the Constitutional right of Congress to do many things in the making of war has not heretofore, I think, been doubted.

I have searched in vain for a clause in the Constitution

which can be construed, either by "law logic" or by any common sense that I am acquainted with, as conferring upon the President the sole power of *making* war. You refer in this connection to but two provisions of the Constitution. I will quote the paragraph, which was marked for insertion among the extracts in my first letter, but omitted in an attempt at compression. It is this : —

"I find that the inaugural oath of the President, as prescribed in that document, binds him to the duty, not merely of supporting, like all other officers of the Government, but of *preserving, protecting* and **DEFENDING** the Constitution, to the best of his ability. I find that the Constitution, in order that he may perform his oath, makes him "Commander-in-chief of the Army and Navy." — [And then you add] — "I find that though Congress has the right to *declare* war, the President alone has the right to *make* war."

In the absence of anything else, adduced for the purpose, it seems that the first two findings are the basis of the third.

But the oath to *preserve, protect* and *defend* the Constitution, certainly does not give to the President the power, nor show that he alone has the power, to *make* war. The terms do not embrace or imply it. The President might *defend* the Constitution to the best of his ability, without any power to make war. He is to defend it within the scope and power of his office, and we look elsewhere to find the scope of his powers. This is the first time, so far as I now recollect, in which an official oath to discharge the duties of an office, (and the whole oath of the President is of that character,) has been supposed to contain a distinct and independent grant of power, not otherwise conferred. I am quite sure that it is the first instance in which the oath to support and defend the Constitution has been supposed to contain within it a grant of power to subvert the rights of the States, and thereby, practically to limit those amendments of the Constitution which declare, — that "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people;" and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power of emancipation supposed to be conferred by this power to *make* war,

derived from the oath, is a power to change Constitutional rights, so that rights which confessedly remain to the States and to the people absolutely, in time of peace, shall be held by them at the pleasure of the President in time of war; because, forsooth, he is bound by oath to preserve, protect and defend the Constitution; of which these amendments are a part.

Undoubtedly an oath of office may be expressed in such terms, that the terms may serve to give a construction to other provisions of a constitution, or law, whichever may contain it. But that is not the case here. There is no other provision which the language of the oath either restricts or enlarges. It would be equally the duty of the President to *preserve, protect and defend* the Constitution if that clause of the oath had been omitted. Its only design and operation was, and is, to superadd the solemn sanction of an oath, to secure more effectually, if necessary, the performance of the duty which is imposed by the provisions vesting the executive power in the President, and constituting him Commander-in-chief of the Army and Navy.

But the provision constituting him Commander-in-chief contains no exclusive grant of power to make war. It is the duty of a Commander-in-chief to make war in conjunction with such other authorities as may participate in making war. It shows that the President has certain powers in relation to war, such as are usually possessed by a commander, and may rightfully belong to a Commander-in-chief in a Republican government, in which all grants of power are by and through the Constitution, which limits and controls power, as well as grants it. The duty of the President as the officer in whom the Executive power is vested, and who is at the same time Commander-in-chief, binds him to use the proper powers of an Executive Magistrate, and a Commander-in-chief, in preserving, protecting and defending the Constitution. The oath adds a solemn sanction to the duty. But it is no part of the duty of a Commander-in-chief of the United States to subvert State rights, or in time of war to change provisions of the Constitution, or to alter the State laws. He may suspend the operation of the latter to a certain extent, wherever he carries martial law. But he cannot

institute martial law beyond the limits where he can enforce it at the time, and where it may exist consistently with other provisions of the Constitution.

Furthermore: in relation to your position that the President alone has the power to make war: The Constitution provides that Congress shall have power to provide for the common defence and general welfare of the United States. That includes the power to provide for the defence of the Constitution, and if it is necessary to defend it by war, then to make provisions for the defence in that mode. It is quite as much the duty of Congress to defend the Constitution, in the legislative department, as it is of the President to defend it in the executive department, and in his capacity as Commander-in-chief. Congress has also, by express grant, not only power to *declare* war, but power to grant letters of marque and reprisals; to make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to make rules for the government of the land and naval forces; and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. It is surely not necessary for me to show that the exercise of these powers has quite as much to do with the *making* of war, as the marshalling of squadrons, or any other of what may be termed the executive operations in the field.

The Constitution vests in Congress all legislative powers therein granted. All the legislative powers exercised in making war (and without their exercise any war made by the President alone would be exceedingly short,) are powers of making war vested in Congress.

Your finding "that the President alone has power to make war" ignores all the powers of Congress, above specified, which relate to the making of war. Really, if you deal thus with the Constitution, you should furnish the community with an expurgated edition, with notes and comments according to the rules of that particular kind of common sense which excludes "law logic."

Another of your propositions is, that the policy you speak of being adopted, "the territory held by the rebels, must be recognized as hostile territory, to be conquered and re-

annexed." "Henceforth the war is," (as you say) "to regain by conquest a wide territory which has been wrested from the people of the United States, to whom it rightfully belongs — to establish the Constitution and the laws of the Union in regions over which at present they have no more sway or force than they have in Patagonia."

In stating this proposition I have omitted some intervening words, which serve rather to obscure, than to make clear, the proposition itself. You have a way of intermixing matters which do not exist, or have no necessary connection with each other, as if they formed parts of a single connected proposition, thereby presenting the subject-matter with a false appearance. For instance, you say that policy must be adopted which recognizes the rebels, not as a political party, whose opposition to the Government is a little irregular, and must be gently corrected, but as enemies to be destroyed. And then comes the recognition of the hostile territory to be conquered and reannexed. See Extract No. 2. I suppose that this prefatory matter is a little piece of clerical irony, as I am not aware of any party which thinks that the irregularity is *small*, or that the correction should be *gentle*. Again, (see Extract No. 3) you speak of "the preposterous policy which regards the enslaved as property, and property in slaves as preëminently sacred." I know no party which holds property in slaves as *preëminently sacred*, nor any such policy; and this preëminent sacredness which you introduce certainly has no necessary connection with the recognition of slaves as property. Another instance, to which I have already referred, and which I present again in this connection, for the purpose of noting your mode of argument, is thus stated: — "I am aware that some lawyers have undertaken to argue from the Constitution against the right of the President to do what he has done. But though a hundred lawyers should attempt to convince me that the Government is restrained by the Constitution from defending its own existence in a civil war," &c., (see the 7th and 8th extracts) as if an argument against the right of the President was an argument of that character. It is not said that it is the lawyers who are in favor of *gentle* correction, and who hold slave property to be *preëminently sacred*, but it may be left as inference, perhaps,

that "*all men who oppose the proclamation,*" maintain all of these inferential, interpolated, opinions. I pray you to consider whether this mode of reasoning is quite consistent with that kind "of common sense" which should characterize a preacher of the gospel, however it may be used by the profane sophists, who defend criminals in a police court, or argue patent cases before juries.

Having said this much, by way of showing that in stating your proposition respecting conquest, &c., I have left out some of the intervening matter, not only because it is not material to the proposition itself, but because it serves to put a false gloss upon it, I must reserve the inquiry upon what ground it is that we are to recognize the seceded States, as hostile territory, &c., for another letter.

Yours, &c.

CAMBRIDGE, Dec. 9, 1862.

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TO THE REV. LEONARD BACON, D. D.

No. 4.

SIR,—I proceed to the consideration of your proposition, "that the territory held by the rebels must be recognized as hostile territory to be conquered and reannexed;"—or, as you state it in another paragraph, that "it is now the earnest reality of war to crush a powerful and desperate enemy—to regain by conquest a wide territory which has been wrested from the people of the United States, to whom it rightfully belongs—to establish the Constitution and the laws of the Union in regions over which, at present, they have no more sway or force than they have in Patagonia."

The territory occupied by the rebels comprises several States which were in league with each other, and with other States, under the Confederation, and the people of which participated in the formation of the Constitution—and some States which have been admitted into the Union since the Constitution was adopted.



Prior to the rebellion, the Constitution extended over all those States, binding them and others together in one government, for the purposes specified in that instrument. When and how has the territory comprised within them been "*wrested* from the people of the United States," so that it "must be recognized as hostile territory to be conquered and reannexed?"

It must be remembered that the territory, so far as it is comprised within the States existing at the time the Constitution was adopted, never belonged to the United States, nor have the United States ever had any right in or over it, except by the adoption of the Constitution, and through laws passed in consequence thereof. Until the adoption of the Constitution, the United States did not exist, but there was State sovereignty, limited to some extent by the articles of Confederation. The adoption of the Constitution did not confer upon the United States any territorial sovereignty, except for the purposes and in the manner set forth and provided for in that instrument, the State governments remaining as before. Of course there has not been — there cannot have been — any wresting of the territory from the people of the United States, except that the rightful power which the United States might and ought to exercise, under the Constitution, has been subverted, or, rather, suspended, for the time being, by force. And in that view, any *reannexation* — which, by the way, is a very inappropriate term — would be a restoration, so far as possible, of the state of things existing previous to the rebellion. But that would not be a "conquest"; and the use of the terms "conquest" and "reannexed" serve to show that you mean something more than the mere restoration of the authority of the United States. It is apparent, from the whole tenor of your article, that you desire, through *conquest* and *reannexation*, to accomplish something which could not be done by the mere suppression of the rebellion; — that is to say, the emancipation of the slaves.

Now I deny that any part of this territory has been wrested from the people of the United States. Waiving the fact that the United States never held full rights of sovereignty over very large portions of it, I maintain that there never has

been a time since the rebellion commenced when the territory has not belonged to the United States in as full and ample a manner as it did before that period ; that there has not been any time when the jurisdiction of the United States, political and legal, has not been as ample as it was before the first act of secession was passed ; nor any time when the laws of the United States have not been in *force* throughout the territory, precisely as they were prior to the insurrection ; although, by reason of a treasonable and forcible opposition to their execution, the actual enforcement of them has been obstructed and prevented.

If this is so, then it is preposterous, as well as mischievous, to talk of *conquest* and *reannexation*.

The question recurs : When and how has this territory been "wrested from the people of the United States," so that it "must be recognized as hostile territory to be conquered and reannexed" ?

The fact that conventions of the people, in the several States, have adopted acts of secession, does not wrest the territory within those States from the United States. The acts of secession are void ; and the sovereignty, jurisdiction, and authority of the United States remain as before.

The fact that the traitors are so numerous that they are able to usurp the State authority and act as if they held the legitimate State government, has not changed the character of the rebellion from the crime of persons to the crime of States. Since the adoption of the Constitution, the only legitimate Constitutional government within a State is one organized in accordance with the Constitution, recognizing the existence of the government of the Union within its proper sphere, although questions may arise respecting the extent and exercise of its powers. The usurpation is rebellion, and did not change the legal relations of the United States to the several States, nor the relations of the States, as such, to the United States. So it was understood in Congress when the following resolution was passed, which has not been repealed, viz. :

"That the present deplorable civil war has been forced upon the country by the disunionists of the Southern States, now in arms against the Constitutional Government, and in arms around the Cap-

itol ; that in this National emergency, Congress, banishing all feeling of mere passion and resentment, will recollect only its duty to the whole country ; that this war is not waged on their part in any spirit of oppression, or for any purpose of conquest or subjugation, or purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution, and to preserve the Union, with all the dignity, equality, and rights of the several States unimpaired ; and that as soon as these objects are accomplished the war ought to cease."

The acts of the persons who have participated in the insurrection were treasonable, but treason, by persons, is not treason by a State, which cannot commit treason. Treason by persons does not enlarge the sovereignty or authority of the United States, nor cause a forfeiture of the rights of a State, Mr. Sumner's litter of nine still-born resolutions to the contrary notwithstanding. In accordance with this position is the fact, that there are several members of Congress from Virginia and Tennessee still holding their seats, notwithstanding the votes of secession and acts of usurpation and war, in those States. Others, elected in Eastern Virginia, have been denied seats, not because of secession and war, but by reason of defects in the elections. The idea that a State is *felo de se*, and has become a territory of the United States at the same time that it lives, as a State, by its representation in Congress, is of itself suicidal, if there were no other objections, of which, however, there are many. The idea of establishing the Constitution in a State where it has been fully established, and continues established, so that there is a representation in Congress under it, is a very perfect absurdity. A declaration, that in order to crush the rebellion, the territory of a State occupied by the rebels, but which has a representation in Congress, must be regarded as hostile territory, to be conquered and reannexed, would be an exhibition of superlative nonsense and folly, if these characteristics were not merged in the iniquity of such a declaration, in unsettling men's minds respecting their rights and duties. But the representation in Congress is only *evidence* of the existing relations of a State. Georgia is a State in the Union equally with Virginia, Tennessee, or Massachusetts. She might forthwith send a representation to Congress, without asking leave.

That the war has not wrested the territory from the United States, is apparent from what has been already stated. It has not changed the legal relations. The existence of the war neither requires conquest of territory or reannexation, although it requires vigorous efforts to subdue the rebels. The rebels occupied a part of Maryland in full force, and with all the operations of war. It was wrested from us in one sense, that is to say, forcible possession was taken. But forcible possession, merely, is not what you mean. The rebels have been driven out of Maryland, but the territory has not been conquered or reannexed. The territory they now occupy will not be "wrested" from us until they achieve their independence. Then if we would regain it we must conquer it.

Until that time they remain bound by their allegiance and liable to punishment for the acts of treason which they commit within the territory they occupy; and the laws of the United States are in force there for the punishment of that treason. So Congress understood when that body, on the 27th of July, 1862, passed an act providing for seizure and confiscation of property, and for emancipation in certain cases. And so you seem to understand, when you say, that "the process of actual emancipation is going on under the acts of Congress," &c. The provisions respecting treason extend over the whole territory, and any other acts of Congress, applicable to that territory, are, of course, equally in force there.

The question recurs. When and how has this territory been wrested from the people of the United States, so that it must be recognized as hostile territory to be conquered and reannexed. I await your answer.

Without doubt there was, and is, a practical suspension of the relations between the United States and States where the usurpation exists. The *de facto* government, which exists there, refuses to perform the Constitutional duties of the legitimate Government, and along with many of the people, obstructs the execution of the laws of the Union. But all this will terminate upon the suppression of the rebellion, and the restoration of a legitimate administration of the State

government — a government *de jure* — without conquest or reannexation.

If the insurrection shall be suppressed, there will be no necessity to admit those States again, nor to reenact the laws of the United States which were in force there before the insurrection commenced, nor even those of a general character which have passed since that time, because there will have been no time when the States were without the pale of the Constitution, or when that, and all the laws of Congress, were not legally in force there. When the force of the rebels is overcome, the Courts of the United States may resume the discharge of their appropriate functions there, without any new laws for that purpose.

The Constitution still recognizes the rights of the inhabitants of those States, so far as they have not committed crimes against the United States which cause a forfeiture, just as it did before. The rights of property, real and personal, remain to be regulated by the State laws, and are recognized by the United States as before. Among other rights of property, the right of all persons who held slaves under the State laws, to continue to hold them under those laws, except as there may be an actual subversion under the operations of the war, and for offences committed, exists as before, and will continue to exist after the first of January. And the right of the States to a representation founded upon that basis will exist as before. This right of representation is conferred by the Constitution. And the ordinances of secession, the insurrection, the usurpation of State authority, and the war itself, all combined, have not changed the Constitution.

It is hardly necessary to add, that the "great proclamation" has not wrested the territory from the people of the United States, nor changed the Constitution, although it has doubtless made it much more difficult to reestablish the Constitutional authority of the United States in its active exercise over that territory.

Do you not know, that in thus asserting that the territory has been wrested from the people of the United States, and must be regained by conquest, and that the war must be waged for emancipation, you not only virtually admit that

the ordinances of secession had validity, but that you make war upon the Resolve of Congress, which I have cited above, and commit a kind of petit treason against the "great proclamation"? The Resolve of Congress expressly asserts that "the war is not waged on their part for any purpose, of conquest or subjugation, or purpose of overthrowing or interfering with the rights or established institutions of those [Southern] States, but to defend and maintain the supremacy of the Constitution," &c. And the "great proclamation" proclaims and declares "that hereafter, as heretofore, the war will be prosecuted for the objects of practically *restoring the Constitutional relation* between the United States and the people thereof, in which States that relation *is or may be suspended or disturbed*."

In another letter I will consider your argument, as drawn from the fact that certain things may be done in the enemy's country in time of war.

Yours, &c.

CAMBRIDGE, Dec. 16, 1862.

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*Note.*— I have just seen in that pious political sheet, the New York Independent, of Dec. 11th, this paragraph:—

"The army before Fredericksburg is still motionless. The prospect of winter quarters grows more and more certain. The rebels paint the word on boards and display it across the river to our troops with jeering triumph. This shows how fatal they know an advance would be to them."

Well, the advance has been made; and many a desolate home and mourning household at the North testify how "fatal" it has been to us. This is one of the results of "the policy." Banks, instead of making a demonstration which might have drawn off Lee to the defence of Richmond, has been sent—*somewhere*; it is said, among other things, "to make Texas a free State"; and Burnside is directed to make a direct attack in front upon the enemy's entrenchments, under circumstances that render defeat almost, if not quite, certain. Was this done to give us another exhibition of Secretary Stanton's "military strategy"; or was it to satisfy the New York Tribune, which "sees in it much cause for public satisfaction"; or is this the mode in which your

Constitutional emancipation is to be worked out? If this is the way in which the "conquest" is to be made, what will become of the great proclamation and the universal emancipation, and of your Constitutional law, as connected therewith?

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TO THE REV. LEONARD BACON, D.D.

No. 5.

SIR,—I proceed to the consideration of two of your propositions which have the semblance of argument, but which utterly fail to sustain your conclusion. They take the shape of inquiries, to wit:—

"Has the President a right by the Constitution, and is it his duty, to wage war in South Carolina—has he a right, and is it his duty, to bombard cities, to burn villages, to cut down groves and forests, to obstruct harbors, to turn rivers from their channels, and to mow down regiments of men in battle, when these measures are necessary to a speedy and thorough conquest—has he a right to do all this in defiance of the only government and laws now existing in that State—and has he not a right to proclaim that, after a certain day, unless the people of that State shall in the meantime reestablish a State government under the Federal Constitution, no distinction shall be recognized among them but the distinction between friends and enemies of the United States, and that every friend, whatever his former condition, shall be recognized and protected as a freeman?"

"If the President, or a military commander, acting by his authority, may seize private property, when needed for military purposes—if he may take cotton, provisions, forage, horses, and all sorts of cattle from the loyal as well as the disloyal—giving to loyal owners an assurance of indemnity hereafter; may he not also take this property with a like assurance of indemnity to loyal owners?" See Extracts 10 and 11 in Letter No. 1.

For the purpose of showing wherein, and how, the argument in these inquiries falls entirely short of the purpose for which you present them, it may be well, in the first place, to ascertain distinctly what is, or is to be, the scope, force, and effect of the "great proclamation."

Much of the difference of opinion, which exists in the community, respecting the power of the President to issue the proclamation, is, I think, occasioned by a difference of supposition respecting what it proposes, and is intended to accomplish.

Some persons seem to think that the Constitutional power is not to be disputed, because the President may threaten the rebels. It will do no harm. Perhaps they will be alarmed, submit, and choose representatives in Congress before the first of January.

My dog, if I had one, might bark at the moon. He would have a constitutional power so to do. But what mischief would be done to the moon; and what benefit would accrue to the dog! The proclamation is, of itself, no more effective for good than the dog's bark would be. It is doubtless a much more efficient agent for evil.

The President may notify Queen Victoria, that if she does not return Mason and Slidell within ninety days, he will proclaim in what part of her Indian dominions the sepoys shall be emancipated from the oppression to which they are now subjected. I doubt whether he would be liable to impeachment if he should do such a foolish thing. But would Her Majesty be very much alarmed, by the notification, except as it indicated hostility? And if he should designate the limits, at the end of the ninety days, would the sepoys be relieved from the oppression? The measure might serve to unite nearly all the people of England in a bitter hostility to us. And that is the legitimate effect of the proclamation, upon the people of the South. The rebels know that the proclamation is of no avail without a successful war on our part. It is the war that they fear, and not the proclamation. The newspaper paragraphs, stating that the proclamation causes great alarm among them, are baits to catch gulls, or, without a metaphor, lies to deceive fools.

Some persons seem to regard the proclamation as a measure of punishment;—as a confiscation of slaves for the crime of rebellion or treason. They say, may not the rebels be punished by taking away their slaves, as well as other property? Is property in slaves preëminently sacred?



Admit that it is not; that confiscation is a proper punishment for treason; and that confiscation may free slaves, as well as convert other property of the traitor to the use of the Government. But the President has no power to confiscate the property of any person for treason. That is the province of Congress, and the Judiciary; and Congress, on the 17th of July last, passed an act to punish treason, seize and confiscate the property of rebels, &c., which not only provides for the emancipation of his slaves, upon the conviction of the traitor, but enacts further, that all slaves of persons engaged in the rebellion, or who give aid and comfort thereto, escaping from such persons and taking refuge within the lines of the army, and all slaves captured from such persons, or deserted by them and coming under the control of the Government; and all slaves of such persons found or being within any place occupied by rebel forces and afterwards occupied by the forces of the United States, shall be deemed captives of war, and forever free from their servitude. If there may be some doubts respecting the Constitutionality of all portions of this enactment, it is much more free from Constitutional difficulties than a proclamation, as a measure of confiscation. Moreover, the emancipation of the proclamation is, as your inquiries imply, to be of the slaves of the loyal, as well as the disloyal. It is not to be sustained, therefore, as an act of confiscation.

Others are of opinion that the President, as Commander-in-chief, may direct that wherever the army goes, and overcomes the power of the rebels, the slaves shall be free; and they construe the proclamation as meaning no more than that; because, so far as the power of the master is not overcome, it is clear that there can be no emancipation.

I have no doubt that where the army carries successful warfare, there martial law—the law of force—is, for the time being, the governing power for all the purposes of the war; and as the liberation of the slaves—so far as that liberation is then and there a practical subversion of the power of the master—may weaken the power of the rebellion, it may be regarded as one of the means of carrying on the war. The slave may be required to perform labor and service, in any of the warlike operations for the suppression of the rebel-

lion. The power and control of the master over the slave may thus be broken, for the time being, and the relation of master and slave is thereby suspended. This is by the legitimate effect of martial law — the law of force — which supersedes the municipal law of the State. Now if the slave avails himself of this subversion of the power and control of the master — of this severance for the time being of the relation of master and slave — and departs without the limits where slavery is admitted, he will secure the permanence of his freedom, because, as I maintain, he cannot afterwards be claimed and returned under the fugitive slave clause of the Constitution and the laws of Congress. He acquired liberty, practically, without becoming a fugitive. He is not a fugitive if he avails himself of that liberty to go where he pleases, and so he cannot be sent back as a fugitive on the suppression of the rebellion. So also if the Government, during the time when the law of force is the governing power, removes him from the limits where the municipal law requires his servitude.

Upon the same principle, I do not doubt that the President, as Commander-in-chief, or a commanding general in the field, may, in the lawful exercise of hostilities, for the purpose of weakening the enemy, invite the slaves to come within the lines of the army, and assure them of protection, which may be made effectual by their removal beyond the subsequent operation of the municipal law.

A commander may invite all persons within the hostile lines to come within his camp, and to bring with them whatever gives strength to the enemy. And in regard to all slaves who should comply with such a call, the relation of master and slave would be actually severed, when they come within the limits where the law of force, adverse to the servitude under such circumstances, is the governing power. Coming within the lines under such a lawful exercise of military power, they could not be deemed fugitives, within the meaning of the Constitution; but would stand in the same category with slaves, brought within its limits by the march of the army. There might be a question, in both cases, whether loyal masters were not entitled to indemnity. That need not be settled at this time.

But all this has no tendency to sustain the proclamation. Military occupation — martial law — the law of the force exerted by the army — only suspends the municipal law for the time being. It does not subvert it permanently. Neither the commander of the army in the field, nor the President, can give to martial law any such extension, that it will subvert the municipal law, except so far as there has been, not merely a suspension, but an actual change in the existing state of things, by the operations of the war. It is not in the nature of martial law to provide rules, prospectively, for governing the rights and duties of persons after itself shall have ceased to exist. What it has changed, is, of course, subject to the change, as far as it goes. What it has not changed, it cannot regulate for the future after it ceases. The law of force operates so long as the actual military force sustains it, but no longer. This is readily illustrated. The army, in the course of its march, occupies the land of an individual, and the officers take possession of his house, and are not trespassers. They take his crops and consume them, and are not trespassers. No action will lie against them at the time, or afterwards. He may, or may not, have a claim upon the Government for indemnity. When they remove, he cannot, of course, regain his crops which have been consumed, but the commanding officer has acquired no title to his house or farm, nor any right to regulate his occupancy or power over that property, which thus remains, after the war is over. His right to occupy and use was suspended by the war, and by the law of the force which drove him out; but it was only suspended, and he enters and holds under his old title. So it is with the crops not consumed, and with his furniture. So it may be with his slaves, who have been liberated from his control for the time being, and have been under the control of the military power; if they remain and give the master an opportunity to assert his old title.

This is all the emancipation which can be had in the course of the war; and if I could read the proclamation as extending no farther than such emancipation, I should have no controversy with any one who supported it. The opportunity to secure freedom in this way was, I think, substan-

tially provided for before the proclamation, by orders directing military commanders not to return slaves who came within their lines. No proclamation was necessary for that purpose; but an additional order for their removal, so that they would be beyond the future control of their masters, might have been but an act of justice to them, especially if they had been actively engaged in aiding the prosecution of the hostilities on our part. A successful warfare would, upon these principles, make the emancipation one of large measure, sufficient to satisfy reasonable men. Taken in connection with the restriction of slavery in the territories, it would probably give a death-blow to slavery.

But those who have so vigorously urged "the adoption of a policy" and the issue of a "proclamation of emancipation," do not consider this the limit of the emancipation which is to be effected by it. I understand that you give it a much broader scope, as I believe you are authorized to do. You say that it threatens the people in each rebel State "with the emancipation of all their slaves" and speak of "the day when every slave under the rebel power shall be (so far as our Government is concerned) irrevocably free;" and it is, doubtless, for this reason that you call it "the great proclamation." It is, of course, *to give freedom after the return of peace*, (if it does not prevent our arms from being victorious,) *to slaves who have never been within our power during the war*, — to slaves in the interior, who may never have heard of the proclamation, — to slaves where martial law never had an existence, — to slaves who, during all the war, and up to the return of peace, were as perfectly and as peaceably under the full control of their masters as they were before the war commenced; and who, during the war, had been engaged in the same services which they had performed before war existed; and it pledges the military and executive power to maintain the freedom thus bestowed. It is to operate therefore as a *decree*, or *law*, for the emancipation of probably half, perhaps more, of the slaves in the States designated, not as a punishment of rebels, for it operates on friends also, — not because martial law ever reached them, — not because there was in fact any subversion of the power and control of the master during the war, — and not because such emancipation

was necessary to the prosecution and success of the war; for the fact that they remain in slavery until the military operations have ceased, completely negatives any such "military necessity." The military necessity upon which you and others rely to sustain the proclamation,—and under the guise of which you and they are willing to surrender all the liberties of the freemen of the United States, and to subject them to a most absolute military despotism, in order to subserve your favorite project of giving freedom to all the slaves,—is thus shown to be either a careless or ignorant assumption, or a mere excuse, perhaps a hollow pretence, in some instances I fear a wicked subterfuge;—by which those who contend that the President may do anything which is required by the military necessity,—and that he is the sole judge when the necessity exists, and what it requires,—hope to accomplish an unconstitutional purpose, at the risk of a final disruption of the Union and the formation of several Confederacies. Professor Patterson, of Dartmouth College, in a recent speech, accepting a Congressional nomination, pledged himself "to support, unconditionally," "*every military necessity to which the constituted authorities may deem it proper to resort, to crush the rebellion.*" That expresses the character of the thing with admirable precision. The Professor understands it perfectly. The military necessity to proclaim the emancipation of all the slaves is not one which the rebellion and the progress of the war have thrust upon the Government, requiring the measure for the public safety; but it is, emphatically, *a necessity to which the constituted authorities have deemed it proper to resort.* It is not a necessity which has pressed itself upon them, but one which they have *sought out*, and are endeavoring to press into their service. It is, literally, a necessity which "knows no law." This is the first time, perhaps, in which a "necessity" has been drafted into service, but we read of those who, in other times, "have sought out many inventions."

And now for your argument in support of the power to emancipate the slaves, which you base upon the fact that the President may do certain other things in time of war. The fact that this emancipation by means of the proclamation is to operate in a great measure at the close of the war,

shows the wide and almost entire difference between this exercise of power, and its exercise in those cases which you put by way of illustration and argument, in the above extracts; in each of which, respectively, the power to destroy and the power to seize and take, is a power to act during the war, and one which cannot lawfully be exercised after the cessation of hostilities, even upon an order issued prior to that time. The President may "bombard cities," "burn villages," and "mow down regiments of men in battle," in the actual prosecution of a war; but he can do none of those things, nor order that they shall be done, at the close of the war. He, or a military commander, may seize private property, when needed for military purposes, while the war lasts; he may "take cotton, provisions, forage, horses, and all sorts of cattle, from the loyal as well as the disloyal," if the necessity of the hour require it, in the prosecution of the campaign; but he cannot perpetuate a necessity so to seize and take after the war is over, even by an order issued before its termination. Perhaps the military authorities may seize and take provisions, &c., to supply the necessities of the army, after the close of the war, until it can be withdrawn; but the proclamation does not propose to emancipate the negroes, for the time being, to supply the necessities of the soldiers. Your argument is a very perfect *non sequitur*.

By way of illustrating your own views, and the difference between you and Dr. Cheever,—who I understand would have the proclamation denounce slavery in good round terms, as well as exterminate it,—you refer to the power of the Mayor of New York, under the city charter and acts of the Legislature, to blow up buildings in order to prevent the spreading of fire. Now suppose Mayor Opdyke, during the time that a fire is raging, should order a few buildings to be blown up to check it; and should further order, that as soon as the fire was subdued, a few squares more should be blown up, by way of preventing the possible breaking out of another fire, at some indefinite time afterwards, do you not think that the people would "blow him up?"

I give your "common sense" the credit of perceiving, by this time, that you have been talking, very oracularly, about matters respecting which you are profoundly ignorant; and

that you have thereupon made an exhibition of yourself according to the general rule in such cases made and provided.

The prosecution of the war for a restoration of the authority of the United States, under the Constitution, should command the undivided support of the whole people of the loyal States. A war for emancipation, which is in other words a war for a revolution, cannot be supported, as such, by those who have sworn to support the Constitution, consistently with the oaths they have taken; and if it is placed on that basis, there must be divisions at the North, as well as between the North and South. The infamous attempt to charge "disloyalty" upon all who do not support the proclamation, whatever countenance it has had in Senatorial speeches, or Fraternity lectures, or "Views from a Watchtower," will have no terrors for those persons who, faithful to their Constitutional obligations, are attempting to avert the ruin which is impending over us if we do not abide by the Constitution.

In a remaining letter I will show, that if the United States had, in this contest, all belligerent rights, and the President alone had the right to make war, and might make the war one of conquest, the President would not, even in that case, have a Constitutional power to emancipate the slaves, in seceding States, by a proclamation.

Yours, &c.

CAMBRIDGE, Dec. 25, 1862.

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TO THE REV. LEONARD BACON, D. D.

No. 6.

SIR,— It will not be deemed presumption, I think, to assume that it has been shown: 1. That the United States have not exercised all the rights of a belligerent in their efforts to suppress the rebellion, notwithstanding the contest has assumed the proportions of war, and cannot do so without conceding similar rights to the rebels; 2. That the President has not alone the right to *make* war; 3. That in the attempt to subdue the rebellion, we have no right to make a

*conquest* of the territory included in the seceding States, and that we cannot, under the Constitution, make the war one of conquest, unless we admit that the rebellion has severed those States from the Union, so that they are to be regarded and treated as foreign States.

In addition to this, it has been proved that there is no "military necessity," and can be no such necessity, for an emancipation of slaves which shall take effect only after the war is over, and the rebellion subdued, — that a great proportion of the emancipation proposed by the proclamation must be of that character, — and that your arguments in favor of the proclamation, drawn from what may be done by military power in the prosecution of a war, wholly fail of showing any right on the part of the President to give freedom to the slaves by a mere proclamation for that purpose.

I propose now to show, that even if the United States had in this war all belligerent rights, — if the President alone had the right to make war, — and if the war was a war for conquest, the President would have no right to emancipate all the slaves by proclamation, or in any other mode.

Assuming the truth of all these propositions, the President would have no greater power of emancipation than he has if the war is regarded, as it ought to be, one prosecuted on the part of the United States to suppress the rebellion, and to reëstablish the authority of the United States, in active exercise, in those places where it is now practically inoperative by reason of the rebellion. On such assumption, the war must be carried on according to the general principles which regulate war between two independent nations, but with all Constitutional limitations to determine what power the President may exercise in such a war.

In order to determine whether the President may give freedom to the slaves, even in such a war, it may be well to examine a little more closely the nature and character of the act by which the emancipation is to be effected. It is called a "proclamation," but that designation does not serve to determine its character.

On the 22d of September the President proclaimed and declared that on the 1st of January, 1863, "all persons held as slaves in any State, or any designated part of a State, the



people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free, and the Executive Government of the United States, including the military and naval authority, will recognize and maintain the freedom of such persons." The forthcoming proclamation is to designate the States or parts of States.

The emancipation of all the slaves within the territory designated is to result from these acts, whether there has or has not been any practical severance of the relation of master and slave in the course of the war. The proclamation is of itself to be an act which gives freedom to all the slaves, whether of loyal or disloyal masters, not only during the time of the rebellion, but ever afterwards, so that it becomes legally operative, of itself, as a charter of freedom. It is intended to be an act of enfranchisement that the slaves may plead hereafter in the courts of justice, if necessary, to establish their right to freedom. The President is represented, in a recent paragraph, as placing it on that ground; and as saying that this may be done as a war measure, "but not as a measure issuing from the bosom of philanthropy." Such is substantially your doctrine. The enfranchisement is not to result from the operation of the war upon the slave, by an actual subversion of the power of the master, but from the proclamation of the President, subverting the power of the master. In other words, the power of the President, exerted through and by the proclamation, is, of itself, *proprio vigore*, to give freedom, without aid from anything else,—without any military operation connected with it,—but by the mere force of the President's declaration that it shall be so.

Upon what constitutional or legal principle is this to be sustained? What must be the legal character of this act, supposing it to possess any legality?

It is clear that it is not a lawful act of the President, as the chief executive magistrate of the United States. The Executive department possesses no such power to deprive a citizen of his property held under the laws of a State. The chief executive magistrate of a State has no such power. If Governor Andrew should issue his proclamation that the title of the fifty-four thousand persons who voted against him at the last election, to the property which they had pre-

viously possessed, should, from the date, be annulled, and held of no further force or effect; and that any person who should take possession of any of the goods of the said "guerillas of Jefferson Davis," might plead his proclamation in defence of any suit which should be brought against him therefor; the courts of Massachusetts would have no difficulty in disposing of his proclamation. But he has just as much right to do this, as an act of Executive power, as President Lincoln has to do an act of a similar character. Such a change of title, or subversion of title, is not within the scope of Executive power.

If it were claimed that the proclamation was in the nature of a *judgment* or *decree* of emancipation, that would be in its nature an exercise of judicial power. But the President has no *judicial* power for such a purpose.

If it be said that it is a *law* of enfranchisement, which is doubtless its true character, if it has any character, it is equally clear that the President has no power to make a *law*. All the legislative powers, under the Constitution, are expressly vested in Congress.

So far as I am aware, it is not contended that the President, *as President*, can liberate the slaves.

But it is alleged that the President, as Commander-in-chief, may, in time of war, liberate the slaves, although he may not do it as President, by virtue of his powers as an executive magistrate. That, I think, is substantially the position. To this I answer that the act of emancipation, so far as it is not accomplished by the war itself, but depends solely upon the proclamation, is, in its character, a *law*,—that it is in its nature a *legislative act*, and that the objection already stated applies in full force. The President has, as Commander-in-chief, no legislative power. The emancipation in the West Indies, by Great Britain, was by Parliament,—in the District of Columbia, by Congress,—in the Northern States, by law also.

Again: It is said, that although the President cannot emancipate by a law, he may do so in time of war by a military order; and it has been alleged that the proclamation, although not in form, is, in effect, a military order. But if the emancipation is not to be accomplished by the operations of

the war itself, there is nothing gained to the argument by a change of name, and calling the proclamation a military order. "A rose by any other name would smell as sweet;" and a skunk-cabbage, by any other name, would not smell any sweeter. Calling it "a military order," under the war power, does not even make it a measure of war, if it is to operate of itself, — of its own force, — without military enforcement; as the proclamation must be designed to operate in all cases where the slaves remain under the control of their masters until the close of the war. In all such cases, as has been said, it effects nothing for the purposes of the war. So far, it is in its nature and effect legislation, just as much as if it was an act of Congress, passed in time of peace.

But let us test this in another mode. Suppose we treat it as a "military order," by the Commander-in-chief, and lay out of consideration your admission that the President's powers are strictly limited. Take the strongest case. May the Commander-in-chief, in a foreign war, waged for the purpose of conquest, by a military order which will take effect practically at the close of the war, liberate all the slaves of the enemy who have remained under the control and in the service of their masters up to that time?

According to the approved usages of civilized nations, it is not in the power of the Commander-in-chief of an invading army, by any military order, to change the laws of the country invaded, or the title to private property there, not even during the time of the war; except as the property comes under the actual control of the military force, in the manner stated in my last letter. Still more clear must it be, that he could not, by an order which had its operation after the war had ceased, change the existing rights of property under such laws. If the President, in a war with Spain, should take the field as generalissimo, invade Cuba, and order that all the property of the inhabitants should be confiscated, and become the property of the United States, and the slaves be emancipated; the cession of Cuba, at the close of the war, would not give effect to the order, either to pass the title of the property, or to emancipate the slaves of owners who remained in full possession and control up to the close of the war. It would not even pass the title of real

estate of which the military force had been in possession. Personal property seized and carried off by military force during the war might not be recovered back.

I am aware that the authority of Mr. John Quincy Adams is invoked to sustain the proposition, that where a country is invaded, "the commanders of both armies have power to emancipate all the slaves in the invaded territory;" and these words of his, if separated from the context, may at first appear to be broad enough to cover the proposition, that the mere order of the commander, without more, will operate as an effectual decree of emancipation. But that would be preposterous. If the British commander who captured Washington, in the war of 1812, had proclaimed the emancipation of all the slaves in the United States, do you suppose it could have been pleaded by the slaves as an effectual emancipation, or that any right of the masters would in any way have been affected by the "military order," standing alone? That it could not have been the opinion of Mr. Adams, that such order would have any legal operation beyond its actual execution by the military force — by martial law — seems to be evident from the context, which serves to show that he intended to say merely, that the commander, by his actual military operations, might emancipate the slaves. He was contending against an assumption that Congress had no authority to interfere with slavery in any way, and endeavoring to show that Congress might, in certain cases, interfere with it, both for and against. In the course of the discussion, speaking of the war power, he said: —

"When your country is actually in war, whether it be a war of invasion or a war of insurrection, Congress has power to carry on the war, and must carry it on, according to the laws of war; and by the laws of war, an invaded country has all its laws and municipal institutions swept by the board, and martial law takes the place of them. This power in Congress has, perhaps, never been called into exercise under the present Constitution of the United States. But when the laws of war are in force, what, I ask, is one of those laws? It is this: that when a country is invaded, and two hostile armies are set in martial array, the commanders of both armies have power to emancipate all the slaves in the invaded territory."

Now, did Mr. Adams mean to assert, that upon the mere invasion of a country all the laws and municipal institutions of that country were swept away;—that, for example, upon the invasion of the United States, in the war of 1812, all the laws and municipal institutions of the United States were swept away, and martial law substituted all over the country? Most assuredly, not! If he had, the assertion would have shown him to have been a fit subject for the occupancy of a madhouse. What he meant undoubtedly was, that so far as the march of the invading army extended,—so far as the law of force became the governing power,—the laws and the municipal institutions of the invaded country were swept away for the time being, the martial law of the invaders taking the place of them. Even this would not be true to the letter; for if the invaders did not see fit to apply their force to shut up the courts of justice, those courts might still sit under the municipal law; suits might be instituted, which did not involve any matter connected with the hostilities; and valid judgments be rendered under the municipal law. Probably this is not usually permitted, where there is actual occupation by a hostile military force.

If Mr. Adams's remark, in relation to laws and municipal institutions, had this limited significance, it would seem that his remark relating to emancipation, almost in juxtaposition with the other, must have a similar limitation; and thus limited I am not disposed to contest it, provided the commander of the invading force, having severed the relation of master and slave, carries the slave beyond the power of the master. Such was the nature of other cases, which have been cited to support the broad principle, but prove nothing more than this limited operation of martial law. In another part of the same speech he remarked: "I say that military authority takes, *for the time*, the place of all municipal institutions, slavery among the rest."

That the conquest of a country does not subvert its laws, or the rights of property, until the conquering State sees fit to change them, may be shown by abundant authorities. A single extract from Chancellor Kent's Commentaries, will suffice for the present purpose.

"It is a settled principle in the law and usage of nations that the inhabitants of a conquered territory change their allegiance, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property, not taken from them by the orders of the conqueror, remain undisturbed. The cession or conquest of a territory does not affect the rights of property. The laws, usages, and municipal regulations in force at the time of the conquest or cession, remain in force, *until changed by the new sovereign*. There is no doubt of the power of the sovereign to change the laws of a conquered or ceded country, unless restrained by the capitulation or treaty of cession. In the case of the Canal Appraisers *vs.* the People, in 17 Wendell's R. 587, Chancellor Walworth declared that, in the case of a country acquired by conquest, no formal act of legislation is necessary to change the law; the mere will of the conqueror is sufficient. This is the case where the conqueror is in possession of the legislative as well as the executive power; and until a nation or territory is wholly subdued, the conqueror is only entitled, by the usage of nations, to hold it as a temporary possession, by military occupation until the final issue of the conquest is settled by treaty, or by the competent Constitutional power. The principle of national law, as declared by the courts of the United States, is that conquest does not give the conqueror *plenum dominium et utile*." 1 Kent's Com. (6th ed.) 178, note *b*.

I have omitted the references to several books of authority cited by the Chancellor in the foregoing extract to sustain his positions.

This may serve for the present to show that even in the case of a foreign conquest, the President, if he were in the field as Commander-in-chief, could not by a military order emancipate the slaves, except through an actual severance of the control of the master connected with it. He would not be the "new sovereign" and has no power of legislation. What is thus true in the case of a conquest of foreign territory must be true, much more clearly, if possible, where the military occupation is of territory within the Union for the purpose of suppressing a rebellion.

I had intended to make some remarks upon your distinction between "emancipation" and "abolition," and that between the right of the President to emancipate, because it will be the "means of crushing the rebellion," and a want of right to emancipate because "slavery is wrong;" but this

discussion has already extended much beyond the limits which I anticipated when it commenced, and I am not disposed to add to it at the present time.

Trusting that in the next of your "Views from a Watch-tower," you will not see that lawyers and their logic are out of place in the discussion of questions of Constitutional law; and that your vision will be sufficiently clear to enable you to "avoid the conviction" that those who oppose the proclamation, "intend nothing else — than some concession to the rebels, which shall either divide the Union, or subvert the Constitution," and "are now willing to sacrifice the Union for the sake of saving slavery;" —

I remain, Yours, &c.

CAMBRIDGE, Dec. 31, 1862.

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TO THE REV. LEONARD BACON, D.D.

No. 7.

SIR, — I duly received your note in "The Congregationalist" of January 16th, acknowledging the receipt of six letters published over my name in "The Boston Post," and addressed personally to you; in which you say, that you propose to study them with some care, and express a hope that in the next number of "The New Englander" you may be able to contribute somewhat to the elucidation of the matters which I have invited you to discuss with me.

I shall look with interest for the results of that study, and of your farther reflections upon the subject, more especially as I am told that "The New York Independent" has already informed the public, in anticipation of the forthcoming discussion in "The New Englander," that "Dr. Bacon hits hard and cuts deep."

In the mean time, permit me to commend to your particular attention some portions of my fifth letter, in which I stated the differing views which different persons took of the proclamation, and from which I make these extracts: —

"Others are of opinion that the President, as Commander-in-chief, may direct that wherever the army goes, and overcomes the power of the rebels, the slaves shall be free; and they construe the proclamation as meaning no more than that; because, so far as the power of the master is not overcome, it is clear that there can be no emancipation.

"I have no doubt that where the army carries successful warfare, there martial law — the law of force — is, for the time being, the governing power for all the purposes of the war; and as the liberation of the slaves — so far as that liberation is then and there a practical subversion of the power of the master — may weaken the power of the rebellion, it may be regarded as one of the means of carrying on the war."

\* \* \* \* \*

"Upon the same principle, I do not doubt that the President, as Commander-in-chief, or a commanding general in the field, may, in the lawful exercise of hostilities, for the purpose of weakening the enemy, invite the slaves to come within the lines of the army, and assure them of protection, which may be made effectual by their removal beyond the subsequent operation of the municipal law."

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"This is all the emancipation which can be had in the course of the war; and if I could read the proclamation as extending no farther than such emancipation, I should have no controversy with any one who supported it. The opportunity to secure freedom in this way, was, I think, substantially provided for before the proclamation, by orders directing military commanders not to return slaves who came within their lines."

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"But those who have so vigorously urged 'the adoption of a policy' and the issue of a 'proclamation of emancipation,' do not consider this the limit of the emancipation which is to be effected by it. I understand that you give it a much broader scope, as I believe you are authorized to do. You say that it threatens the people in each rebel State 'with the emancipation of all their slaves' and speak of 'the day when every slave under the rebel power shall be (so far as our Government is concerned) irrevocably free;' and it is, doubtless, for this reason that you call it 'the great proclamation.' It is, of course, to give freedom after the return of peace, (if it does not prevent our arms from being victorious,) to slaves who have never been within our power during the war."

\* \* \* \* \*

"It is to operate therefore as a *decree* or *law* for the emancipation of probably half, perhaps more, of the slaves in the States designated,



not as a punishment of rebels, for it operates on friends also, not because martial law ever reached them, — not because there was in fact any subversion of the power and control of the master during the war, — and not because such emancipation was necessary to the prosecution and success of the war; for the fact that they remain in slavery until the military operations have ceased, completely negatives any such ‘military necessity.’ ”

It was upon the last construction, as its obvious intent and meaning, that I contended that it was a usurpation of power, mischievous, unwarrantable, and unconstitutional.

Now I have, very recently, been credibly informed, that Mr. Secretary Stanton says not only that the proclamation is a war measure, — a military order, — (that was said in the outset,) but that its effect is merely to give freedom to the slaves who come within the actual power of our army during the war; and that when peace comes those who are not thus set free will remain as slaves. And further, that if the people of a State designated in the proclamation should lay down their arms, submit, and send representatives to Congress, the proclamation would have no effect in the liberation of the slaves there. In other words, the Secretary now gives to it precisely that construction, and measure of emancipation, of which I said, “*if I could read the proclamation as extending no farther than such emancipation, I should have no controversy with any one who supported it.*”

How this is, you can probably ascertain by application at head-quarters. Certain it is, that Republicans begin to be quite sure that this is all that was ever intended by the proclamation, and to be very much surprised that any one should construe it otherwise.

One thing, which I shall hope to learn from the forthcoming “New Englander,” is, whether, if this is to be the official interpretation and construction of this document, you will still regard it as “*the great proclamation.*” If this is all which is meant by it, the axe which was to be laid unto the “*root*” of the rebellion seems to have lost its edge, and to have become no better than any other poor tool for Abolition purposes. If this is all which is to be accomplished by the proclamation, the great jubilee of emancipation, in Boston, on the first of January, becomes a farce; and a qualifying sup-

plement must be added to the hallelujahs which ascended about that time, in various quarters (to say nothing of New Bedford) on the allegation that freedom had been bestowed on three millions of slaves.

If, on such a construction, you should come to the conclusion, that the proclamation is a very small matter for a proclamation, but a great matter of humbug, and a greater matter for mischief, I may be inclined to agree with you.

Yours, &c.

CAMBRIDGE, Feb. 16, 1863.

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*Not sent, & not received*

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**R E P L Y**  
TO  
**PROFESSOR PARKER'S LETTERS,**  
IN THE BOSTON POST,  
TO  
**REV. LEONARD BACON, D. D.**  
BY REV. LEONARD BACON, D. D.

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From the "New Englander" for April, 1863.

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# REPLY TO PROFESSOR PARKER,

BY

REV. LEONARD BACON, D. D.,

NEW HAVEN, CONN.

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[From the "New Englander" for April, 1863.]

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## ARTICLE III.—REPLY TO PROFESSOR PARKER.

*Boston Post*, Nov. 29, Dec. 8, 12, 20, 27, 1862—Jan. 3, and Feb. 18, 1863. [Letters to the Rev. LEONARD BACON, D. D., New Haven, Conn.]

TO THE HON. JOEL PARKER, LL. D.,

Royal Professor of Law in Harvard College, Cambridge, Mass.

SIR,—If the seven letters which you have addressed to me in the columns of a Boston newspaper, had been digested into a pamphlet addressed directly to the public, I might have criticized it in the humble capacity of a reviewer without regarding the debate as in any sense a personal one between you and me; or I might have been silent without seeming to confess that your strictures on a newspaper article from my pen are unanswerable, or to deem them unworthy of notice. But your letters, as they lie before me, are in the nature of a challenge to a personal debate. Either I must reply to them in my own name, or I must be entirely silent; and if I am silent after such a challenge, that will of course be construed as meaning either that I have no respectful opinion of your letters, or that I dare not attempt a reply. The conductors of the *New Englander* have therefore conceded to me the privilege of answering your letters by a review in the form of a letter to their author.

When I speak of a personal debate, I do not use that word “personal” as implying any departure from the rules of controversial courtesy. I do not complain of your letters in that respect; nor do I intend that you shall have any reason to complain of my answer. Yet I may be allowed to say, at the outset, that you are, and I am not, a professional lawyer; that having held a high judicial office, and being now a Professor in the Law School of Harvard College, you have attained an enviable eminence in your profession; and that therefore your opinions on the main question which you have chal-

lenged me to debate with you, may be expected to have with at least a large part of the public, an authority which mine cannot have. It gives me pleasure to say farther, that unless I am misinformed, you have done yourself honor, both as a lawyer and as a citizen, by repudiating the gross iniquity and chicanery of the Dred Scott decision, and all the policy of President Buchanan's administration in regard to slavery; that you have been uncompromisingly opposed to the extension of slavery and to its existence in any territory of the Union; and that your opposition to President Lincoln's administration began in an unfortunate attempt so lately as last autumn to organize a party in Massachusetts, which should at once sustain the President and defeat the reelection of Senator Sumner. There are disloyal men in the loyal states—men whose sympathies are with the rebellion more than with the government—men who hold that the moral and political opposition to slavery which characterizes the free-labor states is opposition to the Constitution and the Union, and that therefore the rebellion is justifiable, and the war on our part a crime—men who seem to have hardly any other conception of the Constitution than that it was instituted for the purpose of guaranteeing and nationalizing the institution of African slavery. Having no respect for these men, or for any of them, high or low in position, I am happy to be assured that you are not one of them.

Without farther preface, I proceed to the questions which you have invited me to discuss with you.

The first of these questions, you will allow me to say, requires a more accurate statement than you have given. Your statement of the question is such—or rather, your various statements are so discordant—that I am at a loss to know whether there is really any disagreement between us about it, or what the proposition is which one of us maintains and the other denies. You begin with the announcement that you have undertaken to perform “a duty which some one owes to the profession of the law and to the community generally;” and you describe the duty in these words:—

"It is the duty of vindicating the right of the gentlemen of the Bar to form their opinions upon legal subjects, and especially upon the construction of the Constitution of the United States, and to express those opinions in any manner consistent with due courtesy to others, without being subjected to censure, sneers, abuse, and vituperation, by a class of clergymen who assume to know more of constitutional law than the tribunals and officers created and constituted for the purpose of discussing and determining legal questions."

Is this your statement of the point on which you expect me to join issue with you? If so, there is no dispute between us. The right which you have undertaken to assert for "the gentlemen of the Bar" is cheerfully conceded; and if the right needs to be vindicated, I am as ready as you are to vindicate it against all comers. As for the "class of clergymen who assume to *know more* of constitutional law than the tribunals and officers created and constituted for the purpose of discussing and determining legal questions," I am not of them, nor will I undertake to defend them.

After expatiating a little on this statement, you put the question in a somewhat different way:—"If the clergy really *have the best set of rules* by which to determine our constitutional rights and duties." Allow me to say that on this question I have no dispute with you. I have never pretended that clergymen, whose professional business is to expound the documents of our religion, have any better rules, or any other rules, for the interpretation of documents, than the rules which are prescribed to your profession for the interpretation of written laws and constitutions. What other clergymen may have said or implied, is no concern of mine, inasmuch as I have never made myself responsible for them. Should you be able to discover a clergyman who says that the "clergy" have other and better rules of interpretation than those which are recognized in your profession, I shall accept the fact as proof of what needs no proof, namely, that every profession has its blunderers.

Looking a little further, I find still another statement of the question. After admitting "that among the lawyers themselves there is a difference of opinion upon various questions of constitutional law," you say,—

"But that is not at all material to the present inquiry, which has no reference

to the differences of construction by different lawyers, but is *whether clergymen are entitled to pass final judgment*, and overrule any and all lawyers with whom they differ on such subjects."

Do you really think, my dear Sir, that this is the question between you and me? When you made that statement of the question, did you mean to pretend that, either explicitly or by any implication, I have claimed in behalf of clergymen the right "to pass *final judgment*" on questions of constitutional law? But what else could you mean, if you considered at all the force of the words you were writing? Surely you must have had a very contemptuous opinion of my understanding, if you thought that, by any artifice, I could be induced to discuss such a question with you or with anybody else.

The occasion on which you have challenged me to this debate, was an article which was published in the *Congregationalist* of October 31st, and which the editor of that journal took the liberty of announcing as mine. In that article not one word was said concerning the rights or prerogatives of clergymen—not one word having the remotest allusion to the clerical profession. I wrote not as a clergyman but anonymously, and the mention of my name by the editor was neither intended by me nor expected. How is it, then, that you undertake to raise upon that article an issue between the clerical profession and the legal? I respectfully deny your right to demand that I shall defend any proposition for which I have not made myself directly or indirectly responsible, or shall discuss with you in this public manner any question not germane to the matter of that article.

For the sake of showing more distinctly how wide of the mark your aim is, let me ask you to read again, and to read more calmly and accurately than you seem to have done, all that portion of my newspaper article which can be regarded as having any relation to this first question, whatever it may be. The President's "great proclamation" of September 22d, was the subject on which I ventured to offer some observations from my own point of view. After showing *first* that the President had not been coerced into that great measure, against his own judgment, by the importunity of self-constituted

advisers; *secondly*, that the necessity for it had become, in my view, obvious to all who care more for the Constitution and the Union than for slavery; and, *thirdly*, that the proclamation marks a definite stage in the progress of the war, I touched another topic in these words:—

“Concerning the constitutional power of the President to issue such a proclamation, I have no shadow of a doubt. I am aware that some lawyers have undertaken to argue from the Constitution, against the right of the President to do what he has done in this respect. But though a hundred lawyers should undertake to convince me that the government is restrained by the Constitution from defending its own existence in a civil war, or that there is any one of the rights of a belligerent which it may not exercise in the territory of a state which has rejected the Constitution, and made war upon the Union, they can never impose that absurdity upon me, nor upon any man who is not willing to abnegate his own common sense in favor of somebody else’s professional sense. I have a great respect for lawyers in their place, but I must be permitted to remember that lawyership is not the same thing with statesmanship; and to insist that the Constitution of the United States, like the Bible, is to be interpreted by the common sense of the people. I find that the inaugural oath of the President, as prescribed in that document, binds him to the duty, not *merely* of supporting, like all other officers of government, but of *preserving, protecting, and defending* the Constitution, to the best of his ability. I find that the Constitution, in order that he may perform his oath, makes him “Commander-in-chief of the army and navy.” I find that though Congress has the right to *declare* war, the President alone has the right to *make* war. To my common sense, the right and the duty to make war against the enemies of the United States, be they foreigners or rebels, involves, or rather is the right and the duty of conquering and crushing them by every legitimate method of war. Has the President a right by the Constitution, and is it his duty, to wage war in South Carolina—has he a right, and is it his duty to bombard cities, to burn villages, to cut down groves and forests, to obstruct harbors, to turn rivers from their channels, and to mow down regiments of men in battle, when these measures are necessary to a speedy and thorough conquest—has he a right to do all this in defiance of the only government and laws now existing in that state—and has he not a right to proclaim that, after a certain day, unless the people of that state shall in the meantime reestablish a state government under the Federal Constitution, no distinction shall be recognized among them but the distinction between friends and enemies of the United States, and that every friend, whatever his former condition, shall be recognized and protected as a freeman? Shame on the law-logic which undertakes to mystify our common sense! Admit that slaves are property, (though the Constitution does not know them in any other character than that of ‘persons’), what then? Is there any preëminent sacredness in that particular kind of property? If the President, or a military commander, acting by his authority, may seize private property, when needed for military purposes—if he may take cotton, provisions, forage, horses, and all sorts of cattle, from the loyal as well as

the disloyal—giving to loyal owners an assurance of indemnity hereafter; may he not also take *this* property with a like assurance of indemnity to loyal owners? And if the conversion of all that property from private ownership to the use and service of the United States, by a proclamation of freedom to the slaves, is necessary, as a means of crushing the enemy, then that is just the thing which he must do, or violate his oath to ‘preserve, protect, and defend the Constitution of the United States.’”

What then is my offense? It is not that I have denied “the right of the gentlemen of the Bar to form their opinions upon legal subjects, and especially upon the Constitution of the United States, and to express their opinion in any manner consistent with due courtesy to others.” It is not that in behalf of the clergy, or as a clergyman, I have pretended to have a better “set of rules by which to determine our constitutional rights and duties” than lawyers have. It is not that I have claimed for the clergy the prerogative of “passing *final* judgment” on questions of constitutional interpretation. Not I, but you, have brought into this discussion the suggestion that I am a clergyman. Surely you need not be told that in relation to any question of jurisprudence to be decided by a court, you are the professional *clerics*, and I am simply a layman. All my offense is, that being in the language of your profession a layman, I have claimed for myself, in common with all citizens, the right of private judgment concerning the meaning of the Constitution, and that, in exercising my right of private judgment, I have dared to reject the opinion, not of all lawyers, but of “*some* lawyers,” concerning the powers which the Constitution permits the President to wield against the enemies of the United States. The study and practice of your profession tends, or should tend, to exactness in the statement of a disputed proposition or question. If a student in your office, being entrusted with the task of drawing a declaration for the plaintiff or a plea for the defendant in a civil action, should miss the mark as widely as you have done in your attempt to raise an issue between yourself and me, about the mutual relations of your profession and mine, I think he would receive a severe rebuke.

Should I attempt to state the case for you, when you have so greatly failed in stating it for yourself, I might expose my-

self to the charge of presumption. Without undertaking to do in form what I think you ought to have done, I will venture to make a suggestion or two leading in that direction. Evidently you were displeased that I, not being a lawyer, and being a clergyman, have professed to think for myself on a certain question of constitutional interpretation, and have published an opinion confessedly differing from that of "some lawyers," among whom (though I had no thought of you, and almost no knowledge of you, at the time) you happen to be included. Allow me to say that you might have saved yourself some trouble if you had more carefully considered the ground of your displeasure before you began to write. Aside from the alleged erroneousness of my opinion, and of the considerations which I offered in support of it; what is the principle which I violated, and which you are called to vindicate? Is it that your profession has exclusive rights which I have invaded by thinking for myself, and saying what I think? Or is it that my profession divests me of rights which are common to all other citizens? Let me suggest, respectfully, that in taking occasion from the paragraph above cited, to raise an issue between "the gentlemen of the Bar" and "the clergy," you ought to have taken your position frankly upon one or the other of these two principles, or upon both. Do you hold that when all citizens are enquiring what the President may do, and what he may not do to save the Union and the nation from being destroyed by this rebellion, no man who is not a lawyer has any right to differ in opinion from any man who is a lawyer? Or, do you hold that though other citizens not of your profession have a right of private judgment on such questions, the fact of my being a clergyman divests me of that right?

The paragraph, which I have quoted, is all that I said about the constitutional right of the President to issue his great proclamation. It is the only paragraph in which I made any allusion to lawyers; for the other aspects and bearings of the proclamation involve no legal question. The question, for example, whether the President from the beginning of the war, has always intended to adopt this extreme measure if he should



find it impossible otherwise to suppress the rebellion, is no more a question of jurisprudence than it is a question of medicine or theology. The question whether the President was right or wrong in thinking that the time had come for this extreme measure, and that the attempt to restore the Constitution and the Union without recognizing the manhood of the enslaved population held in subjection by the enemies of the United States had been kept up till its futility was sufficiently demonstrated, is not a question on which the opinion of a lawyer is to be taken as the opinion of an expert. Nor is the question whether the proclamation marks a definite stage of progress in the prosecution of the war, (if there be any doubt on the point), a law question. You seem to have an inkling of a distinction between the question whether the proclamation is expedient and necessary as a measure of hostility against the belligerent enemies of the United States, and the question whether (its expediency and necessity being admitted) it transcends the constitutional powers of the President, and violates his inaugural oath; and yet you apply, as a personal reproach to yourself, not only what I said about "some lawyers" who hold that the President has no power to proclaim the emancipation of persons held in slavery by the belligerent enemies of the United States, but also what I said about a certain class of politicians and demagogues, who pretend that peace can be obtained, and the Union restored by our continuing to make war against the rebels with only one hand, and at the same time helping them with the other hand in their unceasing war with their millions of slaves. A few words of explanation on this point are due to your feelings.

I offer then, for your relief, this explanation.

*First.* In all that I wrote, I had no thought of you either as a politician or as a lawyer. Much as it may be to my disadvantage, I must confess that I had no knowledge of your antipathies and sympathies, or your views concerning the proclamation; and that if I had been asked, Who is the colleague of Prof. Parsons in the Law School at Cambridge, my memory might not have enabled me to answer. *Secondly.* When you say that I brand "all lawyers, and all others who do not concur

with [me] in having no doubt concerning the right to issue the proclamation," and that I charge them "with 'disloyalty,' 'debasing homage to slavery,' and with an intent 'to divide the Union or subvert the Constitution,'" you are entirely mistaken. *Thirdly.* My opinion of the political leaders and partisans whom I had in view, and whom I denounced as "in fact disloyal to the Constitution," remains unchanged. A moment's thought will tell you who they are. You know who the men are "who have so long paid a debasing homage to slavery for the sake of 'saving the Union' that they are now willing to sacrifice the Union for the sake of saving slavery." They are the men who at this moment are talking in New York and New Jersey, in Illinois and Indiana, in Pennsylvania and Kentucky, about a reconstruction of the Union with New England left out. They are the men who at this moment are plotting and moving for a compromise with the perjured and bloody traitors that rule the rebellion. It was to that sort of men that I had reference when I expressed my conviction that they "expect nothing else and intend nothing else than some concession to the rebels, which shall either divide the Union or subvert the Constitution." I may have occasion to say more about them in the progress of this letter. At present it is enough to admit, frankly, that if there are men endowed with an ordinary share of common sense, who deny the necessity of the military policy inaugurated by the proclamation, and "talk about bringing the war to an end in some other way," and who at the same time do not expect either a recognized division of the Union or the restoration of it by the concession of new guarantees to slavery against freedom,—I was mistaken.

You seem to be sensitive about my saying that "I have a great respect for lawyers in their place" but must nevertheless "be permitted to remember that lawyership is not the same thing with statesmanship, and to insist that the Constitution of the United States, like the Bible, is to be interpreted by the common sense of the people." What is the place of a lawyer? He may be a judge, and then his place is on the bench, applying the law to the individual cases, civil and criminal, which come into his court for trial and decision. He may

be a professor of law, and then his place is in the chair of instruction, giving lectures, hearing recitations, initiating his pupils into the science of law, and training them for the profession. If he is neither judge nor professor, his place is in his office, giving advice to clients and drawing law papers, or at the bar conducting and arguing the causes which are entrusted to him. That is what I mean when I say that I have a great respect for lawyers in their place. I honor the profession. I have no sympathy with any vulgar prejudice against it. I recognize it as indispensable to the administration of justice in society, and inseparable from the working of a government in which the rights of property and person are protected by law. I honor the illustrious names of the great lawyers who have adorned the profession by their abilities and their virtues. At the same time my personal acquaintance with lawyers, eminent on the bench or at the bar, assures me that to an ingenuous mind such studies and pursuits as theirs are an invaluable discipline, morally as well as intellectually. So much for the respect that is due to lawyers in their place.

A lawyer, then, is in his place when he is attending to his professional business in the courts or in his office; just as a clergyman or a physician is in his place when performing the duties of his profession. But when a lawyer meddles with public affairs, with questions of political economy or of national policy—that is, with questions of statesmanship, he is not less out of his place as a lawyer, than a physician who meddles with the same questions is out of his place as a physician. Statesmanship, whether as a science or as an art, instead of being exclusively within the domain of your profession, is wholly outside of it—just as it is wholly outside of the medical profession. Of course, I do not mean that when a man becomes a lawyer, he loses his right to think and to say what he thinks on questions of public interest. What I mean is, that his right to think and speak on public affairs belongs to him not as a lawyer but as a citizen; and that, therefore, the physician, the civil engineer, the schoolmaster, or college professor, the merchant, the manufacturer, the farmer, and even the clergyman, being citizens as well as he, have precisely the same right.

Lawyers are an intelligent class; their professional knowledge, and the discipline of their professional studies and pursuits, qualify them to bear an important part in the discussion of public questions; but other men are also intelligent, and may contribute something, each from his own stand-point, to a wise and safe decision of questions in which all are interested. Even if I should concede that in this democratic country lawyers as a class are more likely than any other class to have the special knowledge and training which qualify a man for statesmanship, I cannot forget that some disadvantages, as well as many advantages in respect to the higher walks of political science, are incident to that profession. Your profession, as well as mine, has its infirmities, its technical ways of thinking, its narrow traditions, its superstitious deference to formulas; and these must be thrown off before the mere lawyer can become a true statesman. You have not forgotten what Burke said of Grenville:

"He was bred in a profession. He was bred to the law, which is, in my opinion, one of the first and noblest of human sciences, a science which does more to quicken and invigorate the understanding, than all the other kinds of learning put together, but it is not apt, except in persons very happily born, to open and liberalize the mind exactly in the same proportion."\*

Nor can you have failed to note what he said of lawyers on another occasion:

"Lawyers, I know, cannot make the distinction for which I contend, because they have their strict rule to go by. But legislators ought to do what lawyers cannot, for they have no other rules to bind them but the great principles of reason and equity and the general sense of mankind. These they are bound to obey and follow; and rather to enlarge and enlighten law by the liberality of legislative reason, than to fetter and bind their higher capacity by the narrow constructions of subordinate artificial justice."†

So much for the difference between lawyership and statesmanship.

You admit "that among the lawyers themselves there is a difference of opinion upon various questions of constitutional law." Indeed the fact was too notorious to be overlooked, that, on this very question concerning the constitutional power

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\* Burke. Works, I, 451. Boston: 1839.

† *Ibid.* II, 95.

of the President, you are at variance with lawyers whose eminence in the profession is equal to yours. Why, then, have not I the same right to dissent from you that you have to dissent from President Lincoln, who, as you know, is an eminent lawyer, and from Attorney-General Bates, who is, professionally, more eminent still, and from the multitude of eminent lawyers in Congress and in all the loyal States, who are known to believe that the great measure announced in the Proclamation is legitimate in the present condition of the country? You make no reply, that I have heard of, to the exhaustive argument of Mr. Whiting.\* Why not? Why pour out your seven vials of reply upon so slight a thing as a newspaper article from a Connecticut clergyman? You forego

"The joy which warriors feel  
In foemen worthy of their steel,"

that you may stoop to an argument with me. Why? I can see no other reason than that you deem it quite tolerable for lawyers to differ among themselves on the meaning of the Constitution, and quite intolerable for a man who is not a lawyer, or at least for a clergyman, to differ in opinion on the same subject from any man who is a lawyer.

What, then, am I to do? As a citizen and elector I have responsibilities of which I cannot divest myself. I share in the sovereignty not only of my own state but of the United States. I have taken an oath of fidelity to the Constitution. As an elector I must vote to sustain or condemn the administration in its conduct of the war. But if there is no right of private judgment on the meaning of the Constitution—if I, being not a lawyer but a clergyman, have no right to differ in opinion from any man who is a lawyer—I am in a predicament in which God, I am sure, never intended to put any responsible creature. Under the obligation of an oath, as sacred as that of a juror, I must either sustain the administration or condemn it on this very issue of its conformity to the Constitution; and yet, inas-

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\* *The War Powers of the President, and the Legislative Powers of Congress in relation to Rebellion, Treason, and Slavery.* By WILLIAM WHITING. Boston: John L. Shorey.

**much** as I am not a lawyer but a clergymen, I must not differ in opinion from any man who is a lawyer. I cannot adopt **your** opinion, for in that case I shall differ from Professor Parsons, your learned colleague, and from Judge Bates, the Attorney-General, and from President Lincoln, and from all the lawyers in the cabinet, and from many sagacious, learned, and upright lawyers with whom I am personally acquainted. I cannot adopt their opinion, for in that case I shall differ from you, and I know not how many more, whose professional learning and integrity I would not disparage. Shall I retain a lawyer as my constitutional adviser, and "go it blind" under his direction? But even in that case must I not first exercise my private judgment, and then choose for the director of my conscience some lawyer whose construction of the Constitution I know to be sound?

Such are some of the absurdities into which we are led by the principle that none but lawyers may interpret the Constitution for themselves. In opposition to that principle I assert the sacred and inalienable right of private judgment. The denial of that right in respect to the interpretation of the Bible establishes the priesthood as a spiritual aristocracy, and tends to the speedy and entire corruption of Christianity. Just so the denial of that right in respect to the interpretation of the Constitution sets up a political hierarchy of lawyers, and tends to subvert the Constitution itself. Let it be universally conceded that the people, when called to pronounce their verdict on the measures of the government, must not judge for themselves what their rights are, and their duties, but must exercise their political power under the dictation of "the gentlemen of the Bar"—and instead of the Constitution we have only the ever-accumulating tradition of hierarchical or professional interpretations. The men who in our Saviour's time were wont to say, "This people, who knoweth not the law, are cursed," denying to the laity the power of judging for themselves, were none other than the men who had made the word of God of none effect through their tradition. When the law of Moses had been given into the hands of a professional class to be interpreted by them exclusively and authoritatively, the result

was that not the sacred Law itself, but the Talmud, with its Mishna and Gemara, became the rule from which there was no appeal. As firmly as I believe that the chief security, under God, for the continued life of the Christian religion revealed and recorded in the Bible, is in the people's right of private judgment, ever subjecting the authority of dogmas and traditions to the higher and primitive authority of the scriptures; so firmly do I believe that the chief security, under God, for the system of popular self-government established by the Constitution is in the people's right of private judgment, bringing Dred Scott decisions, and everything else of that sort, to the review of that higher tribunal where the Constitution, in the last appeal, is interpreted by the people's common sense and enforced by the people's power of choosing their own public servants. You are at liberty to instruct the people if you can, and to enlighten and guide their common sense; but your liberty in this respect is also mine.

Intelligent theologians, of all Protestant names, have learned long ago, not to be offended by any honest attempt of laymen to interpret for themselves the documents of our religion. We, of the clerical profession, have learned that religious and theological knowledge (the specialty of our profession) may be sometimes advanced by the studies and publications of men who have never been taught by theological professors, and on whom no ordaining hands were ever laid. We have learned to be thankful rather than angry, when intelligent and earnest men whose training and habits have not qualified them for the pulpit, and whose discourses, if they should attempt to preach, would have no special charm or power for popular assemblies, interest themselves in the discussion of religious and theological questions. Few professional theologians, within the last half century, have done more for the science of religion, by their writings, than has been done by those two great lay teachers, Coleridge and Isaac Taylor. And is it not possible that an intelligent and honest man who is not a professional lawyer may sometimes have sense enough to be in the right on a question of constitutional interpretation, or on some great principle of jurisprudence, on which some lawyers, by

reason of their bondage to precedents, and their technical ways of thinking, have erred? John Hampden was not a lawyer; but he knew what English law was, on one point, better than a majority of the twelve judges of England. Granville Sharp was not a professional lawyer, but he had the sagacity which enabled him to deduce from the elements of English jurisprudence the great principle that slavery cannot exist in England—a principle which the lawyers themselves had not discovered till he taught them.

While I maintain that the Constitution of the United States is a document not for lawyers only but for the people, and is therefore to be interpreted, ultimately, by the people's common sense, I freely admit that in some passages of that great instrument there are words and phrases which belong rather to the technical dialect of English jurisprudence than to our common English tongue, and which require, therefore, some technical knowledge in the interpretation. For example, a plain man may be dependent on a law dictionary, or some such authority, to tell him what is meant by "the writ of habeas corpus," and what is meant by "the privilege" of that writ; but, having obtained a sufficient answer to those two questions, he can see for himself the meaning of the constitutional provision that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." So he may not know what a "bill of attainder" is, till he has obtained the information from somebody versed in legal technicalities; and possibly he may not know what an "*ex post facto* law" is, till he has inquired of the schoolmaster or of some intelligent neighbor; but, having learned the meaning of those phrases, he needs no lawyer to tell him what the Constitution means by saying that "no bill of attainder or *ex post facto* law shall be passed." There is one sentence which preëminently requires a knowledge of phrases peculiar to the science of law. "The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." What is an "attainder of treason?" What is "corruption of blood?"



What is "forfeiture," when used in such a connection? What is the meaning of the verb "attaint"? Both houses of Congress are full of lawyers, but, strangely enough, on this one sentence which it is their business to interpret, the lawyers were at fault. I cannot but suspect that the ablest men of your profession are among those who do not go to Congress. Had you been there in 1862, you surely could have told the conscript fathers that the limitation on the power of Congress to declare the punishment of treason had no other purpose than to exclude from our national legislation that principle of the English common law which punishes the convicted and sentenced traitor by making his children and all his posterity partakers in his punishment, and which not only punishes him personally by the forfeiture of his life and of all his actual possessions, but punishes them also by the forfeiture of whatever might afterwards have descended to them as his heirs. The statesmen who framed the Constitution understood right well the penalties of treason under the English law, for the time had been when they were deeply interested in that subject. For reasons which they had learned to appreciate, they determined that, under the Constitution which they were framing, there should be no place for that theory or fiction of the common law by which the tincture, taint, or attainder of treason works corruption of blood with all its incidents and consequences; and that under no other pretense should the innocent heirs of a convicted and sentenced traitor be hindered from inheriting through him or from him. Therefore they provided not only that there should be no corruption of blood by attainder of treason, but also that no attainder of treason should work the forfeiture of any property other than that of which the person attainted was the owner in his life time. No attainder of treason, under the Constitution and laws of the United States, can "extend to the disinheriting of any heir nor to the prejudice of any person other than the traitor himself." Yet the lawyers in Congress seem not to have known distinctly the meaning of this proviso. Having enacted a new statute for the punishment of treason, they seem to have feared that it was not quite constitutional, and they supplemented it with an explanatory resolution. They took a distinction, unwa-

ranted by the text of the Constitution, between real estate and personal; and though their statute requires an absolute forfeiture and sale of property in certain cases, their supplementary explanation provides that no punishment or proceedings under the statute shall be so construed as to "work forfeiture of the *real* estate of the *offender* beyond his natural life."\*

The Constitution, then, is to be interpreted by common sense, and ultimately by the common sense of the whole people. If it uses, here and there, a law phrase, we may ask lawyers to tell us what the meaning of those words is, or rather what it was when the Constitution was framed, but when we know what those few technical words mean, the meaning of the Constitution, in what it requires and in what it forbids, in what it cedes and in what it withholds, is as intelligible to one intelligent man as to another. The rules and principles of interpretation which you quote from Blackstone and from Story are rules and principles with which every clergyman well educated in his own profession is thoroughly familiar; for they are essentially the same with those which in the language of theological seminaries are called the science of Hermeneutics. They are just what I mean when I say that the Constitution is to be interpreted by the people's common sense, for the science of Hermeneutics, whether for lawyers or for divines, whether applied to the statute book or to the Bible or to any other composition in any human language—is nothing else than an attempt to delineate in a scientific way the processes of thought by which a reader of good common sense ascertains the meaning of what is written or printed on the page before him. It is somewhat remarkable that one of the passages which you have cited from Story, announces the identical proposition on which I insist, to wit, that the Constitution is to be interpreted not by professional subtlety, but by common sense. Allow me to repeat the quotation:

"Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or juridical research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understand-

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\* See *New Englander*, Oct. 1862, p. 716.

ings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss."

Some clergymen, no doubt, are deficient in common sense, and for that reason fall into great mistakes in the interpretation not only of the Constitution but of the Bible, and of whatever else they happen to take in hand. The same thing is true of "some lawyers," and of some men in every profession. If they blunder, it is not because they are lawyers, or clergymen, or of some other profession, but because they are deficient in common sense. But when a clergyman happens to be thus deficient, he is not thereby divested of his rights as a citizen any more than if he were a lawyer. He may still try to understand the Constitution with such sense as he has; and his right to say what he thinks about it, is no less sacred than yours. In proportion to the greatness of his deficiency in common sense, his vagaries will be harmless; for the people who have common sense are not easily imposed upon by individuals who have none. A lawyer with much professional learning and with a deficiency of common sense, is much more likely than any clergyman to mislead the people when he misinterprets the Constitution. Such a lawyer would naturally claim the right to speak as one having authority, and to impose his opinion on the unlearned. The many who never take the trouble to think for themselves are likely to acknowledge his claim, for the reason that he is a lawyer and a learned one, and professes to speak by authority.

Just here is a difference which you, perhaps, have not distinctly thought of, between your profession and mine. Lawyers, you know, are accustomed to express their opinions authoritatively, so far as the laity (that is, the unlearned in the law) are concerned, and to debate questions of law only among themselves. A client has no occasion to understand the grounds or reasons of the opinion which his professional adviser gives him concerning a point of law; he is under the necessity of trusting his advisers and leaving his cause in their hands. A clergyman, on the contrary—a Protestant clergyman—ought to show his hearers good reasons for the doctrines which he propounds. "Search the Scriptures," is a leading maxim not for

him only, but for his hearers. He expects and exhorts them to try all his statements of doctrine and of duty by the standard of the Bible. We need not wonder then if some clergymen venture to inquire into the grounds and reasons of opinions concerning the meaning of the Constitution, instead of resting simply on the authority of this or that lawyer; nor, if on the other hand "some lawyers" are impatient of the impertinence, as they deem it, with which many clergymen, in common with many other citizens, distrust and even contradict the interpretations of the Constitution authoritatively set forth by gentlemen of the bar in popular harangues, or in newspaper essays. The lawyer's studies and his professional practice are continually training him in the intellectual habit of deference to authorities,—by which I mean not only deference to the sovereignty whose will ordains the law, and is recorded in the written statute, but deference to precedents and learned opinions which tell him what the law is. His lucubrations, from the beginning of his studies through his whole course of service at the bar or on the bench, are not exclusively in codes and statute books. The learning of his profession, accumulated in countless volumes, is almost nothing else than a body of traditions, decisions and opinions, resting on the authority of great judges and great lawyers. In the profession of law, therefore, authority is everything. But in the science of theology and religion, as held by Protestants, authority, other than that of the Scriptures, is nothing.

Do not understand me as meaning or implying any disrespect to your profession. I have nothing to say against what Jeremy Bentham used to call "judge-made law." On the contrary, it is the glory of jurisprudence, both English and American, that because it consists so largely in traditionary rules and principles, in the accumulation of judicial decisions, and in the opinions of great lawyers, it is capable of continual progress and of continually reforming its own errors. The science of law is common sense (including the sense of right and wrong) applied to the interpretation of statutes and the administration of justice. It must needs advance, therefore, with the progress of civilization. As the common sense of the

people (including their moral sense) becomes more intelligent, the law, not only in the form of statutes, but in the form of judicial decisions and precedents, undergoes a corresponding change. The "judge-made law," which the chimerical philosopher of Utilitarianism so abhorred, is an inevitable incident of the administration of justice by courts of law, as distinguished from an attempted administration of justice by arbitrary power. At the same time, it is as really as the statute-law, though in a different way, amenable to the moral influences which act upon society. If the course of judicial decisions is in conflict with the moral sense of the people, and with their common sense, the anomaly cannot continue long unless the people are thoroughly enslaved; for everybody knows that in strict propriety of speech there is no "judge-made law." Doubtless "some lawyers" are heedless enough to forget this, and to talk as if the interpretation of the Constitution on one point and another were irreversibly "settled" by judicial authority; but you are not one of that sort. It would be uncourteous if I should suppose it possible for you to forget that a court has no more right or power to make new law in any case tried before it, than it has to make new facts. The duty of judges is not to ordain what the law shall be, but only to declare what the law is; and if through fear or favor—if under the influence of a bribe, or of some personal or partisan interest—if by reason of their ignorance and intellectual obtuseness, or by reason of their moral perverseness, they declare that to be law which was not law till they declared it, the law remains unchanged. In the case of John Hampden nine of the twelve judges declared unequivocally, after a protracted trial, that by the law of England the king might lay a certain tax without consent of parliament; yet everybody knows that in giving such a decision those judges simply declared that to be law which was not law, and that the king's attempt to levy a tax under the name of ship-money was just as unlawful after that decision as before. So in the case of Dred Scott, a majority of the judges attempted to change the Constitution of the United States by the legerdemain of their "law logic." But did they change the Constitution? No, they only violated

the Constitution by turning a poor man out of their court, denying him the justice they were sworn to administer, and consigning him to slavery, under a false pretense. The fact that for that plaintiff spurned from their presence, there was no appeal but to the justice of God, so that the wrong he suffered was without a remedy in this world, cannot diminish by one hair-breadth the injustice or the falsehood of the decision. After that decision the Constitution remained just what it was before,—a plain, intelligible document, without the faintest allusion to any distinction of race or complexion among the various classes of the population, (save when the semi-independent “Indian tribes” are mentioned), and without the remotest implication of the principle which the conspirators (of whom the Chief Justice was on that occasion the organ) intended to interpolate into the supreme law of the land.

No dishonor, then, is imputed to lawyers for their professional deference to authority, when I insist that the interpretation of the Constitution is not the prerogative of any one class of citizens. All citizens, clergymen not excepted, are to read the Constitution for themselves; and it is the right of every citizen to inquire what the Constitution means, to receive light on doubtful or disputed points from whatever quarter it may come, and to give out his opinion in conversation or in public discourse, orally or in print. No doubt a learned and experienced lawyer ought to be right. Yet, even so learned a lawyer as you are cannot be recognized as infallible; and, therefore, in a case in which you are of one opinion, while some clergyman, or some cobbler, ventures to be of a different opinion, it is not only conceivable but possible that your interpretation is wrong, and that of the clergyman or the cobbler right.

I find that I have treated this preliminary question about the comparative rights of lawyers and clergymen to interpret the Constitution, more at length, and in a more rambling way, than I intended. Had you been so kind as to state more exactly the position which you hold and the question you desired me to discuss, you would have saved me this trouble.

The operation of "shelling out the woods" in which an adversary may, perhaps, be lurking with his masked batteries, is inevitably attended with some waste of ammunition.

Proceeding now to the main question, I am relieved of the difficulty which has embarrassed the preliminary discussion. We know what the question is. You maintain, and I deny, that the President in issuing and attempting to carry into effect the proclamation of September 22d, 1862, has violated the Constitution of the United States. The issue involves these subordinate questions: *First*, What guarantees and pledges does the Constitution give, and what duties does it impose upon the Federal Government, in relation to slavery in the several states of the Union? *Secondly*, What are the powers with which the President is invested, in time of war, against the enemies of the United States? *Thirdly*, Is there anything in the Constitution, or in the law of nations, that forbids his using those powers for the suppression of the rebellion? These three questions seem to comprehend all the points of your argument. I hope that in the discussion, guided as I am by your perspicacity and learning, I shall overlook nothing that is really important to a right conclusion.

I. *Relations of the Federal Government to Slavery in the several States.*

It is commonly assumed by a certain class of politicians who have had too much success in their endeavors to mislead the public, that the Constitution is essentially a compact between slaveholding states and free-labor states; that some distinctive rights—not very well defined but commonly spoken of as "Southern rights"—are secured to the slaveholding states; that the conservation of slavery is one chief end for which the Federal Government was instituted; and that to speak or write against slavery is to violate the spirit if not the letter of the Constitution. You need not be told that all these assumptions are unwarranted. But as what I am writing is likely to be read by many persons less accurately informed than you, may be allowed to explain what the Constitution is in its bearings on slavery.

1. The Constitution makes no mention of slaves or slavery.

uses no words synonymous with these. It knows nothing of the relation in which one man is the property of another, and is liable in law to all the incidents of property. Nobody, not otherwise informed, would be able to obtain from the language of that charter the conception of a Helot race having rights which the dominant race was bound to respect, bought and sold like cattle in the market, legally incapable (as brute cattle are) of domestic relations, liable to the infliction of torturing punishment at the caprice of irresponsible power, and compelled to labor without wages and with no share in the proceeds of their labor.

2. This omission is the more significant when we remember that, at the date of the Constitution, negro slavery, as above described, existed in a majority of the states; that in other states it existed under certain modifications restraining its essential barbarism and securing its early extinction; and that in one state it had been absolutely abolished by the will of the people expressed in a declaration of rights. Of course the omission of the words slave and slavery, and of all synonymous words, from a national Constitution designed to form "a more perfect union" of such states, was not accidental. A critical reader with no information concerning the subsequent course of events, would say that the intention must have been to free the Federal Government from all complicity with the institution of slavery. The Constitution knows nothing about human beings held as property—men, women, and children, whose legal status is that of merchandise; and the Government which it established ought to have been equally ignorant. In the intendment of the Federal Constitution all human beings, whatever they may be in the intendment of state legislation, are nothing else than *persons* "endowed by their Creator with inalienable rights."

3. If there were any need of showing by testimony that not only the omission of the words slave and slavery, and of all synonymous words, from the Constitution, but the exclusion of the idea and definition of slavery was intentional on the part of the Convention that framed the Constitution, such testimony is not wanting. The debates in that Convention, as



written down at the time by the diligent hand of James Madison, show that the omission in question was not because the Convention was squeamish about the use of disagreeable words, but because the leading members of that body were perpetually vigilant lest the Constitution they were framing might, by some circumlocution, seem to recognize slaves as property. In one instance, at least, the language of the instrument was modified, after discussion, expressly for the purpose of excluding the possibility of such a construction. If, then, the Constitution recognizes slaves as property; or, if it recognizes slavery, in distinction from other forms of service, as an arrangement to be upheld at all hazards by the Federal Government, it has a meaning which the framers of it expressly intended it should not have.

4. This view is confirmed by an examination of the particular clauses sometimes referred to by those who would have us believe that the Constitution recognizes slaves as property and guarantees slavery against all interference. In neither of those clauses are slaves spoken of under the specific denomination of slaves, or the specific description of human beings owned as property; but in each instance they are included under a more generic description. If the Constitution has occasion to provide that a slave escaping from one state into another shall not therefore be free, but shall be given up on the claim of his master, it does not describe the fugitive as slave, but only as a "person held to service or labor"—a description which includes the apprentice, the redemptioner, and the peon, as well as the slave. Nor does it speak of the master as the owner of a stray chattel, but only as "the party to whom such service or labor may be due"—a description which makes the relation between the fugitive and the claimant the relation of a debt, to be paid not in money but in personal service. If the Constitution has occasion to arrange and define a compromise between the apportionment of representatives and direct taxes among the several States according to their *gross* population, and the apportionment according to their *free* population, it says nothing about slaves, but comprehends them under the general description of persons w

neither free nor held to service for a term of years,—a depiction which includes peonage and the condition of peasants *cripti glebæ*, as well as slavery, and which in every application of it, is far from implying that the “persons” described are regarded as property. If the Constitution has occasion to mention the date at which the Federal Government shall be invested with full power for the suppression of the African slave-trade, it speaks not of the slave-trade nor of Africa, but of “the migration or importation of such persons as any of the States existing may think proper to admit;” and every word which it employs is just as applicable to free emigrants from a European or Asiatic country as it is to slaves from Africa. There is no room then to misunderstand the *animus* of the Constitution in regard to slavery. Not only does that charter of our Government avoid all recognition of slavery as distinguished from service for wages under the obligation of a voluntary contract; but it expressly stigmatizes all forms and methods of servitude in which the obligation to service is not for a definite term of years, by providing that a population, whether slaves, or peons, or peasants bound to the soil, shall be reckoned as worth to the commonwealth three-fifths of what they would be if they were free or a sure and definite expectation of freedom. Thus it holds out to every state containing such a population a standing order that whenever the state shall have abolished its system of servitude, or shall have limited by “a term of years” the personal servitude of all who, by its laws, are held to service, it shall be permitted to represent in Congress, and in the Electoral College, not three-fifths only, but five-fifths of that heretofore degraded population. Instead of the theory so common among legal politicians—the theory incorporated into the Dred Scott decision—namely, that the Constitution abhors a free negro, and regards slavery as the normal condition of the African race—we have the palpable fact that in the estimate of the Constitution the conversion of a negro slave into a free negro adds forty *per cent.* to his value as related to the wealth and power of the State.

6. I do not pretend that slavery was abolished by the Con-

stitution. My position is, that neither the Constitution, nor the government created by it, has anything to do with upholding, perpetuating, or defending that particular institution. Slavery existed before the Constitution, not by the law of nature and of nations, nor by the inherited common law of England, nor by any provision of the old Confederation, but simply by the local law of each several State which had not abolished the barbarism. So it has existed since the organization of our Federal Government, and exists to-day, not by virtue of the Constitution, nor by any authority derived from it, but only by the local law of certain States. Those States, in the exercise of powers not delegated to the Union, make one man the property of another; and because he is property, they make him legally incapable, not only of political, but of civil and social rights. They deny him the right to the use of his own faculties as a human being. They deny him the right to own anything, save as a horse may be said to own the shoes that are nailed to his hoofs, and perhaps the blanket that covers him in his stall. They deny him the right of a husband in his wife, and of a father in his children, making the factitious right of his owner and theirs paramount to all that is sacred in those natural affections and duties which are the first rudiment of society. But of all this the Federal Constitution knows nothing. For all these wrongs it has no responsibility. Whatever the slave may be in the theory and intendment of the local law, established and executed by the State, the Federal Constitution knows him not as a thing, but only as a man—a “person held to service.” The four millions of slaves, in the national census of 1860, are not property, but population, inhabitants whose human nature contributes to the aggregate power of the nation, though the tenure by which they are held to service under state laws, makes them an inferior class, less valuable by two-fifths than they would be if their human nature, with all its capabilities of want and aspiration, of knowledge and progress, of hope and love, could have fair play.

7. The Federal government has no authority to execute state laws. In each several state the local law is made by an authority distinct from that of the nation as a whole, and is ad-

ministered exclusively by magistrates whose power is derived from the same source with the law itself. The national government has nothing to do with the execution or enforcement of any laws but its own. It cannot interfere to protect a wife against the cruelty of an unnatural husband; nor can it release an injured husband from his legal obligation to a faithless wife. As little can it interfere in behalf of a master against his apprentice or his slave, or in behalf of the "person held to service" against "the party to whom such service or labor may be due." The only exception, or pretended exception, to this is when the "person held to service or labor in one State under the laws thereof," has escaped into another State. In that case, and no other, it has been held by Congress and by the Courts, and generally admitted by the American people, that the Federal authority is to interfere by a law of its own for the capture and delivery of the fugitive, which it must execute by its own officers. I have not forgotten the opinion of the late Daniel Webster, that this exception ought not to have been made; but without raising that question it is enough to say that in this instance the exception proves the rule. No functionary of the Federal government, whether civil or military, has anything to do with the administration or execution of the local laws peculiar to every State. Has it ever been claimed that the national authority is bound by the Constitution, or is invested with constitutional power, to interfere, within the jurisdiction of a State, to protect the slave against the severity of the master? On what theory can it be pretended that the same authority is bound, or is authorized to protect the master against the indolence or the fugacity of the slave?

So much it has seemed necessary to say concerning the relations of the national Constitution and government to slavery in the several states. If these views are correct, the conclusion is unavoidable, that in refusing to recognize slaves as property and as liable to the incidents of property, or to assume at any place the administration of the local laws which establish and sustain the institution of slavery, the President and Congress, and the officers, civil and military, under their authority, abdicate no duty imposed upon them by the Constitution. With-

out venturing to censure in any respect the course of the administration, I cannot but think that if President Lincoln had taken this ground, distinctly and unequivocally, from the beginning, some serious difficulties which he has encountered in the conduct of the war, would have been obviated. For example, the answer which General Butler made to a Virginian slaveholder, and which has given a new meaning to the word "contraband," was an ingenious evasion by which a shrewd lawyer, holding the political heresy that slaves are property under the Constitution, succeeded in reconciling his theory as a lawyer with his obvious duty as a patriot soldier. And indeed if slaves are property, they are a kind of property which ought not to be left in possession or within reach of the enemy, for neither quinine, nor saltpetre, nor lead, nor fulminating powder for percussion-caps, is so important to the enemy in military view, as slaves who understand that they have nothing to hope from the success of our arms. But suppose General Butler had said to that Virginian, "The man whom you propose to seize and carry off is indeed within my lines, and for aught I know he may be your slave under the law of Virginia; but I am not here to decide any question between you and him, nor to administer your local law; nor will I permit an unoffending man to be seized in my camp without process of law. Where is your writ or warrant from some competent authority under the Governor of Virginia?" This would have raised the question, "Is there any Governor of Virginia? and if so, who is he?" No man recognizing John Letcher as Governor, or the usurping body at Richmond as the legislative power in that state—no man refusing to recognize Governor Pierpont and the state legislature at Wheeling, should have been tolerated for a moment in claiming under the laws of a government not recognized by the United States the ownership of a human being. This position, which is the only position consistent with the genius of the Constitution, would have made it plain to all men from the outset, that where there is no state government, there is no power to legalize or sustain the law of slavery in any of its distinctive elements. It would have been an effectual proclamation to all the conservatives of

; south and north, that there can be no recognition of  
ation between master and slave by any Federal author-  
ve at the demand of a state government adhering to the  
tution and the Union. But the administration was nat-  
embarrassed by the traditions which it had inherited  
predecessors who seem to have thought that the oath of  
to the Constitution was nothing else than an oath of  
to slavery.

se elementary views illustrate only the normal relation  
Federal Government to slavery as an institution created  
administered by the local laws of certain states in the  
. I now proceed to another topic.

*Powers and Duties of the Federal Government in rela-  
enemies of the United States.*

men who formed the Constitution, and the people who  
d it, had just emerged from a seven years' war, on their  
oil, with one of the most powerful nations of the old  
a war which was at the same time a civil war. Expe-  
had taught them the needfulness of such a government  
ld have ample power to prosecute any future war against  
emies of the United States. Experience had taught  
too, that, by the necessity of the case, war, and especial  
l war, invests a government with powers for the defense  
rty which cannot be wielded in time of peace without  
ing the loss of liberty. The Continental Congress, with  
mal grant of powers from the several states, had placed  
at the head of the nation in its conflict for existence, had  
the Declaration of Independence, had raised armies in  
me of the Union, had issued bills of credit with no other  
han requisitions on the states for money which the states  
pay or refuse to pay at their discretion, had invested  
commander-in-chief with almost dictatorial powers, had  
orth embassies and negotiated treaties, had conducted the  
a successful termination, and having lost by that great  
s, the powers which every government that conducts a  
ust wield against the enemies of the nation, it had be-  
too weak for the easier functions of government in time  
ce. A new government was to be instituted for the na-

tion ; and the experienced statesmen in the convention well knew that if they could institute a government which should perform its functions steadily and efficiently, and without danger to liberty, in times of peace, and which should be entrusted with the duty and the power of the national self-defense, war, whenever it might arise, would invest that government with all power against the enemies of the United States. The Constitution formed by their wisdom takes certain powers from the several states and gives them to the Union. It entrusts the exercise of those powers to a national government, distributing them according to their nature, some to Congress, some to the President, and some to the courts which Congress is required to institute. It carefully reserves certain rights to the several states and to the people ; it provides for justice to "foreign states, citizens or subjects ;" but it takes no care to protect the enemies of the United States against the government which it establishes. Enemies at war with the United States have no rights other than those which are theirs by the law of nations and the laws of war. The Constitution has no occasion to provide for enemies at war with the Union anything else than a speedy and effectual destruction. The idea that declared enemies, waging war upon the Union, have rights under the Constitution, is too preposterous to be entertained. We have only to inquire how the duty of destroying and subjugating the enemies of the United States, and the powers necessary to that end, are divided between Congress and the President.

1. *Powers and Duties of Congress.*

Looking into the Constitution, I find that Congress, as the legislative power of the nation, is to prepare and supply, at its own discretion, all the means and machinery of war, and is, therefore, invested with an almost unlimited power of taxation "to pay the debts and provide for the common defense and general welfare of the United States ;" that it is "to raise and support armies ;" that it is "to provide and maintain a navy ;" that it is "to make rules for the government and regulation of the land and naval forces ;" that it is "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions ;" and that it is "to provide

for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In addition to all this, Congress is invested with the power of declaring war and of legalizing other measures of hostility; so that no war shall be lawful which is not recognized as such by the legislative power of the Union.

## *2. Powers and Duties of the President.*

The Constitution creates one office never known before in the Union, and designates it by a title unknown till then in history. A Congress of the United States had been in existence for half a generation; and the idea of governing the Union by a Congress was familiar to the people. During the revolutionary conflict, all the powers of government (so far as there was any government of the Union) were exercised by Congress without any other warrant than the fact that the United States were at war with a powerful enemy invading the country from abroad, and with enemies at home who were often rising in arms and always ready to help the invaders. Experience had shown the inconveniences and the incurable weakness of such a government. Accordingly, the Congress under the Constitution is a very different thing from what the Continental Congress had been. The difference is not merely that Congress, as now constituted, consists of two houses, the States being represented equally in one and proportionately in the other, and the members voting in both as individuals and not by States; it is also, and chiefly, that the Constitutional Congress is invested with the legislative power of the Union and holds hardly any other power. The power of inquiry in order to the ascertainment of facts, is incidental to the power of legislation. The power of impeachment by the House of Representatives, and removal from office by the Senate, and the power of electing a President by a peculiar method in case of failure on the part of the electoral colleges, are instances of a power not strictly legislative yet properly entrusted to the legislative body. But with these exceptions, Congress, under the Constitution, has no power other than the power of making laws, and, as incident thereto, the power of inquiry. Instead



of governing the Union, as the old Congress attempted to do, our Congress is entrusted with a very different class of functions. By its power of making laws, of taxation, of granting or withholding supplies, of specific appropriation, of inquest, and of impeachment, as well as by its power of declaring war, it is a check upon the government, but it does not govern. The power of *governing* the Union, as distinguished from the power of making laws on the one hand, and from the power of trying and deciding "cases in law and equity" on the other hand, is entrusted to an officer with a new title, the "President of the United States." In him is vested by the Constitution "the executive power"—not simply the power of executing the orders of Congress like a sergeant-at-arms, nor simply the power of carrying into effect like a marshal the sentences of the courts, but the power of executing the functions of what is properly government. The President is the prime minister of the national sovereignty, the responsible head of the entire administration. The present inquiry has nothing to do with his powers in time of peace. It relates only to his powers against the enemies of the United States in time of war.

(1.) If Congress has performed its constitutional duty in the way of legislation, there is an army and a navy, and provision has been made for their support and efficiency; regulations have been established for their government by proper officers; and for the punishment of offenses against military discipline; provision has been made for organizing, arming, and training by a uniform discipline, just that portion of the population which may be required as a militia; and there are laws by which the militia, or any part of it, may be called forth in an emergency "to execute the laws of the Union, suppress insurrections, and repel invasions." Of all that force—the army, the navy, and the militia called into the service of the Union—the President is "commander-in-chief." This is the trust which was committed to Washington in the war for independence. He held the command over the continental army raised by Congress, and over all bodies of militia called into the service of the Union. Whatever powers were wielded by him in that command, against the enemies of the United States, under t

law of nations and the laws of war, are the powers which the Constitution requires the President to use for the destruction and subjugation of the enemies of the United States, whenever war has been legalized by Congress. But there is one very important difference. Washington was commander-in-chief by virtue of a commission from Congress delegating to him powers which they had assumed as belonging to them. The President is commander-in-chief by the *fiat* of the Constitution. The Continental Congress was in fact commander over Washington, who received his orders as well as his commission from that higher authority. The President has no superior but in the sovereignty by whose will the Constitution was ordained and established, and of whose will it is, till duly changed, the highest expression. Congress *declares* war; the President *makes* war.

(2.) If Congress has performed its duty of making provision for an organized and trained militia, and for calling forth that militia in an emergency, the President, in case of a combination to resist the laws of the Union, has power to "take care that the laws be faithfully executed," and in case of an insurrection or invasion, he has power to act at once with warlike force against the enemies of the United States without waiting for Congress to be assembled. Against invaders from abroad or traitors in arms at home, he has power to use immediately all measures of destruction or subjugation not contrary to the law of nations and the laws of war.

(3.) The President has power, with the advice and consent of the Senate, given in a two-thirds vote, to negotiate and conclude a treaty with the enemies of the United States, imposing upon them such terms as victory shall have enabled him to dictate, or submitting to such terms as "the fortune of war" shall have compelled him to accept. The same treaty-making power which acquired, as the result of conquest, California and New Mexico, and which carried the western boundary of Texas to the Rio Grande, is competent to make peace with any hostile power recognized or unrecognized before, and to purchase that peace by any cession of territory, or any national humiliation, which disaster and defeat on our part shall have made inevitable. A treaty made "under the authority of the United

States"—though it cedes the political liberty of the states and the independence of the nation—is "the supreme law of the land," and can be set aside only by renewing the war. While the Constitution has unequivocally ordained that in our government, the President, acting by and with the advice and consent of the Senate, shall be the depository of the treaty-making power, it imposes no limitation on the exercise of that power. Nor is such a limitation really possible. The constitution of Mexico expressly denied to its government the power of ceding any portion of the national territory; but what did that prohibition avail against necessity? Was the treaty invalid by which Mexico purchased peace with the United States? Is the title worthless by which we hold the vast and rich territory ceded to us in that treaty? In the nature of the case every government that can wage war must have a power of making peace on such terms as a victorious enemy may dictate, and that power of making peace can have no limit.

### 3. *Coöperation of Congress and the President.*

The state of war is legalized by act of Congress. Men, money, ships, fortresses, all the means of war, are placed at the disposal of the President by acts of Congress. "Rules concerning captures on land and water" may be made by Congress. A President may be ambitious of conquest; he may have a passion for wielding the powers with which a state of war invests him, but which pass from him when peace returns; he may desire to enrich himself or his friends and dependents with property captured in war; he may entertain designs against the ends for which the Constitution was ordained. But he can do nothing without the coöperation of Congress, and he cannot infringe the prerogatives of that body without exposing himself to impeachment and removal. Congress, on the other hand, is limited and checked by the powers vested in the President. It may declare war; but it cannot make peace. It may impose taxes and make appropriations for warlike purposes; it may authorize the raising of armies by voluntary enlistment or by drafting; but it cannot organize a regiment or set a squadron in the field. It may define the rank, duties, and emoluments of all officers subordinate to the commander

in-chief; but every officer from the lieutenant-general downward, must be nominated, and (with the advice and consent of the Senate) commissioned by the President. Congress depends on the President for an earnest and efficient prosecution of the war which it declares, as really as the President depends on Congress for men and the material means of war.

To sum up this analysis of the powers and duties of the Federal Government in relation to the enemies of the United States, I may say that, in a state of war, recognized as such by Congress, the Government has power to employ the entire resources of the country against the enemies of the country, and its power in that respect is limited only by laws higher than the Constitution and independent of it. Congress having legalized the war, and having provided the men and means, it becomes the constitutional right and duty of the President to use every legitimate method and expedient of war for the purpose of distressing, weakening, destroying, and subduing the enemies of the United States. If there be any such expedient which he persistently refuses to employ, when he knows that in a military point of view it is essential to the early and prosperous termination of the war, he is unfaithful to his office. If he can weaken and embarrass the enemy by inviting any portion of the population under their control to renounce all subjection to that hostile power, and by promising them protection and liberty, it is not only his right but his duty to do so. If those enemies of the United States have under their control millions of slaves whose reluctant labor, though far less productive than the labor of freemen, is to them "the sinews of war," he cannot reasonably regard those slaves as anything else than a population oppressed by the power with which he is waging war for his country; nor can he, without conspicuous unfaithfulness in his high office, refuse to alienate them from the service of that hostile power by giving them every reasonable assurance needful to that end.

But you seem to think that the powers of the President, in the prosecution of the present war, are limited by the fact that the enemies with whom we have to do are traitors and rebels, and are liable in law to the penalties of treason. You main-

tain, if I understand you, that, in this conflict, the United States have not the rights which, by the law of nations and the laws of war, belong to a belligerent power; and that we can not claim those rights without conceding them at the same time to the other party. The question, then, arises, whether there is anything in the Constitution, or in that law of nations which it presupposes, that should restrain the President from using, for the conquest of this rebellion, the powers with which he is invested against the enemies of the United States.

III. *Powers and duties of the President in a war with traitors.*

You have suggested (unintentionally, I presume) a distinction between the present conflict with a huge rebellion, and the process of suppressing a mere insurrection. To avoid admitting that the United States are really at war, you speak of "the right to suppress an *insurrection* by forcible means, which means, from the magnitude of the *rebellion*, have assumed the proportions of war." Let me ask your attention to the distinction which these words suggest, but which you seem to have overlooked. The dictionary says of "insurrection," (I quote from Webster's quarto, first edition), "It differs from *rebellion*, for the latter expresses a revolt, or an attempt to overthrow the government, to establish a different one, or to place the country under another jurisdiction." Under the word "rebellion," it says, "Among the Romans, rebellion was originally a revolt or open resistance to their government among nations that had been subdued in war;" and its first definition of the word is, "An open and avowed renunciation of the authority of the government to which one owes allegiance; or the taking of arms traitorously to resist the authority of lawful government; revolt." The idea of rebellion includes the idea of insurrection, but the reverse may be an insurrection which is not rebellion. This thing with which we have to do at present is more than a mere insurrection. It is in the strict sense—and I might even say in the old Roman sense—a rebellion on the largest scale. South Carolina, for instance, was conquered from the British by the United States in the war of independence; and, instead of

being held as a conquered province, was permitted to become an equal State in the Union. That State, as represented and controlled by its municipal authorities, has now *rebelled*, or made war again. Louisiana and Arkansas were acquired by the equally legitimate method of purchase, and they, in like manner, have revolted and made war against the nation with which they were incorporated. So of all the States which are commonly spoken of as having seceded from the Union,—each of them, as represented by its own local government, has revolted. It is not a strict use of language to speak of this great revolutionary attempt as a mere insurrection. This is not a tumultuous uprising, like the Shays insurrection in Massachusetts, or the whisky insurrection in Pennsylvania, or the Nat Turner insurrection in Virginia; it is a rebellion of local governments, and of the provinces governed by them, against the established and legitimate government of the nation. The distinction is an important one. Where there is a mob that cannot be dispersed by a constable or a squad of policemen, the magistrate may call for military aid; but the quelling of a mob by military force, even though it be necessary to fire upon the rioters, is not war. The tumult may become an insurrection; disorderly hordes of men may undertake to obtain by force a change of laws or a change of government; and a greater and bloodier demonstration of power may be necessary to the restoration of order, but the suppression of a mere insurrection is not war. When the insurrection becomes a revolt, when the local authorities lead and control the movement, when armies instead of mobs assail the imperial or national power, when a usurping government is organized and is claiming recognition, the movement is more than an insurrection—it is a rebellion, and rebellion is war.

I say, then, that what “we, the people of the United States,” have on hand just now, is the conquest of a rebellion. We are not dealing with a riot, nor with a mere insurrection of a rabble. We are in the midst of a civil war, the greatest that the world has ever seen. Almost the entire territory of eleven States has been occupied, and the population subjugated by a great military force, and what we have to do is to regain by

conquest what we have temporarily lost, and to liberate those of our countrymen whose submission to the intrusive and usurping power is so far involuntary as to be excusable. Accordingly this conflict has been recognized as war by the supreme authority of the nation, as well as by the foreign powers that have proclaimed their neutrality. You quote, for another purpose, the manifesto in which Congress announced to the nation and to the world the purposes for which the struggle is to be maintained on our part. I mean the resolution of July, 1861, which I take leave to transcribe as conclusive on the question whether we are really at war.

*"Resolved, That the present deplorable CIVIL WAR has been forced upon the country by the disunionists of the Southern States, now in arms against the constitutional Government, and in arms around the capitol; that in this national emergency, Congress, banishing all feelings of passion or resentment, will recollect only its duty to the whole country; that this WAR is not waged on their part in any spirit of oppression, or for any purpose of conquest or subjugation, or purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution and to preserve the Union, with all the dignity, equality and rights of the several States unimpaired; and that as soon as these objects are accomplished the WAR ought to cease."*

Can anybody who reads the manifesto, be at a loss to decide whether the conflict with the great rebellion is really, in the estimation of the government, war, or only something less than war? Can anybody doubt whether our generals on the land, our admirals on the sea, and the constitutional commander-in-chief of our army and navy are really invested with all belligerent rights against these belligerent enemies of the United States?

You are quite correct in imputing to me the opinion that in this war "the government has all the rights of a belligerent which would be recognized by the law of nations in a foreign war." You are equally correct in saying that "practically there cannot be a war in which there is only one belligerent." But I am compelled to pause over your opinion when you "think it may safely be asserted that there is no war, foreign or domestic, in which one of the parties is entitled to all the rights of a belligerent, as recognized by the law of nations, unless the other party is also entitled to the same rights." While

I admit the safety of your assertion in its most obvious sense, I am constrained to pause over it in the suspicion that there is something equivocal and misleading in your use of the word "right." My suspicion grows when I find you proceeding to say, "If we claim all these rights we must concede them to the Confederates," and arguing that if we recognize the rebels as actually making war upon us, and if we deal with them according to the laws of war, we virtually acknowledge that they are no longer liable to punishment by the civil authorities for the crime of levying war against the United States. That I may be sure of doing you no injustice, I transcribe your language.

"There may be an insurrection, and the Government may seek to assert its authority by force, in which neither party is entitled to the rights of a belligerent. The two parties might be, as they are in this case, belligerents so far as certain foreign nations are concerned, because of the recognition by such nations of the insurgents as a belligerent party. But as between themselves, however grave the proportions of the contest, their *status* is as to each other, that of the preceding lawful authority asserting itself, on the one hand, and rebels attempting to produce revolution on the other, and all acts of active hostility on the part of the rebels would be treason, and punishable accordingly. But when the Government itself, instead of pursuing its attempt to subdue the rebellion, assumes to itself the character of a belligerent, the rebels are the other belligerent, and there can be no new treason, subsequently, on the part of those who before were traitors. The acts of Congress for the punishment of treason by confiscation, &c., could no longer apply to subsequent acts, as between belligerents there can be no treason in acts of hostility.

"If the United States may exercise all the rights of a belligerent in the territory of a State which has rejected the Constitution and made war upon the Union, they may conquer the State, without doubt, and after the conquest treat it as a territory, and change its laws. And so, on the other hand, the State which has rejected the Constitution may, if it can, not only conquer the United States, (which is undoubtedly true, even if the case were one of mere insurrection), but in the attempt so to do, such State would only be exercising the lawful rights of the other belligerent, and if the attempt should fail, those concerned in it would only be subject to the common laws of warfare. The late incursion into Maryland was, on your position, lawful war, and no laws of the United States were broken by the forces concerned in it, so as to subject them to penalties. There are authorities which tend to support these positions, unless they are rejected as 'law logic.'"

Before I proceed to the consideration of your authorities, allow me to say, with all respect, that if you are not amusing



yourself by practicing on me a little of that verbal or logical legerdemain which Coleridge calls "*logodædaly*," you are imposing upon yourself by not observing with sufficient exactness the meaning of the words you use. It is necessary for me to unravel, if I can, the network of sophisms in which your argument would ensnare me. A few simple statements may be sufficient for that purpose.

1. Nothing is more obvious than that there are belligerents wherever there is war, and that wherever there is one belligerent there are two.

2. The recognition of a war as a matter of fact, and the consequent recognition of the parties to that war as belligerents, and as having in relation to each other, and in relation to the world, all the rights which modern civilization concedes to the parties in a war, is a very different thing from recognizing those two parties as independent sovereignties. The European powers have recognized the present conflict in our country as a war, and have therefore recognized the parties as belligerent, but in so doing, they have not recognized the pretended Confederacy as a sovereign power, nor the war as anything else than a great rebellion against the sovereignty of the United States.

3. Wherever there is a war, all the belligerent rights of the belligerent parties may be acknowledged without implying any concession or any assumption in regard to the rightfulness of the war itself, or in regard to the conclusion and consequences of the war. In such an acknowledgment, whether by neutrals toward the parties, or by the parties toward each other, nothing is acknowledged but the fact that the conflict is war, to be conducted in conformity with the usages of the civilized world. The war may be on one side, or on both sides, flagitious in its origin—it may be an unprovoked invasion for purposes of conquest or an unprovoked rebellion against an established and beneficent government, but be it ever so wicked in its origin, and be the question at issue what it may, the recognition of it as a war, and of the parties as belligerents, implies nothing more than that, while the war lasts, the accepted laws of war—including the rules which define the rights of neutrals and the rules

which define the rights of the parties belligerent—are to be respected on all sides. The laws of war relate to nothing but the manner of carrying on the war.

4. Your statement that “the late incursion into Maryland was, on [my] position, lawful war,” and that “no laws of the United States were broken by the forces concerned in it, so as to subject them to penalties,” may serve to illustrate the conclusion of your argument. Judged by the laws of war, the late incursion of the rebels into Maryland was “lawful”—a lawful measure of hostility, as lawful as the operations of General McClellan in the Virginian peninsula. The battle of Antietam was as lawfully fought by the rebels as the battle of Bull Run or any other battle of the war. But with the question whether the war itself is lawful on the part of those whom you call Confederates, the laws of war have no concern. If the acts which the war began—the pretended ordinances of secession, the furtive or violent seizure of the national property, the projected siege of Fort Sumter, ending in the bombardment and capture of that fortress—were in accordance with the Constitution of the United States, which is the supreme law of the land, if they were in accordance with that higher law by whichurrection and revolutionary violence must be justified or condemned, then the whole war is lawful on their part, and the lawfulness of the whole includes the lawfulness of every portion, excepting only those atrocities which are contrary to the usages of civilized races and which are to be punished by military retaliation.

5. Not only has our National Government recognized this conflict expressly as a war, but it has in almost every other way recognized the rebels as a belligerent party, and its own obligation to conduct the conflict in accordance with the laws of war. Has any privateer, captured on the high seas, under the rebel flag, been hanged for piracy? Of the tens of thousands of rebels taken in arms against the United States, has any one been hanged for treason, or tried, or even arraigned before any civil tribunal for an offense against the laws? What one rule or principle is there in the system known as the laws of war, which our Government does not recognize as

ion, the United States are not entitled to the rights of war against the Confederates, so called. Let us see how your authority bears upon your position.

The first question is, what does your author mean by "mere rebellion?" In this section of his chapter on different kinds of wars, he is defining "civil wars," and distinguishing them from "wars of insurrection and revolution" which he has defined in a preceding section. He has already said :

"§ 5. Wars of *insurrection*, and of *revolution*, are generally those undertaken to gain, or to regain, the liberty or independence of the party or state which undertakes them, as was the case with the Americans in 1776, against England. \*

\* A war of revolution is generally undertaken for the dismemberment of a state, by a separation of one of its parts, or for the overthrow and radical change of the government; while an insurrectionary war is sometimes waged for a very different purpose. Both, however, have respect to the internal affairs of the state rather than to its external relations. They are, therefore, in one sense civil wars, and are governed by the same general rules which are applied to that class of wars." *Halleck*, p. 331.

In the light of these definitions there is no doubt into what class Gen. Halleck puts the war in which he is at this moment acting so conspicuous a part. Congress, in its manifesto, calls this a civil war, and so it is in the popular use of words; but his definition makes it a "war of revolution," of which he says that "each party in such cases is usually entitled to the rights of war as against each other, and also with respect to neutrals." This war then has far outgrown the dimensions of what he means by a "mere rebellion." Think you that he regards himself as holding his high command in a war which is conducted "without regard to the general rules of war which international jurisprudence establishes between sovereign states?" The war with John Brown was conducted in that fashion. He and his followers were not allowed to surrender themselves as prisoners of war. As soon as they were caught by the military power of the United States, they were delivered over to the civil power of Virginia to be tried without waiting for their wounds to heal, and to be hanged without mercy. That was what Gen. Halleck means by a "mere rebellion."

Perhaps his use of the word rebellion in this instance is not

perfectly accurate. I find however, in another passage to which I shall presently refer, a clear statement of the distinction which he makes between a mere rebellion, and a war of insurrection or revolution, or a civil war in the more limited sense. Every civil war, in the largest sense, is called a rebellion by the party which sustains the existing government. The chronic civil war in China is a rebellion. The war which the English nation as represented in parliament waged against their forsworn king, is commonly spoken of in English history as "the great rebellion." The war in which the thirteen Anglo-American colonies achieved their independence, was, in all British opinion, a mere rebellion till its success had made it a completed revolution. So the United States to-day are struggling to vanquish a rebellion, but the conflict is nevertheless a "civil war," a "war of insurrection and revolution," as defined by your author, and therefore a war to be conducted in conformity with the recognized laws of war.

Admitting, however, for the sake of argument, that we are dealing with a "mere rebellion," in Gen. Halleck's meaning; and that this is therefore one of the wars in which the rule that "each party is entitled to the rights of war as against the other" may be disregarded,—the next question is whether your author means to say that, in a conflict with rebellion, neither party is entitled to the rights of war as against the other. Does the learned as well as gallant soldier, evidently writing with a sagacious anticipation of events, intend to limit, or to extend, the right of an established government to defend itself against rebellion? When he says that "mere rebellions" are an exception to the rule which concedes belligerent rights to *both* parties in a war of insurrection and revolution, does he mean that an established government has no more right to wage war against a mere rebellion, than the mere rebellion has to make war against the Government? Does he mean what you would have me think he means, namely, that, in a conflict with a mere rebellion, there are some measures and methods of hostility, not inconsistent with the rules and usages of civilized war, which the Government may not employ, if necessary, to effect a speedy and complete

suppression of the rebellion? The question answers itself on a mere inspection of the passage in its connection with the author's argument. What Gen. Halleck means is obviously that in such a conflict the Government has all the rights which military power and military necessity can give, while the rebels have none. Poor John Brown thought that if the Government of the United States should assume to exercise belligerent rights against him, he must needs have belligerent rights against the Government. Was he not mistaken?

If you had carefully read the entire chapter on the "different kinds of wars," you could not have overlooked another section in which your author makes a still more explicit statement of his opinion on the point in question. It is the section in which he incidentally explains what he means by a "mere rebellion;" and for that reason, as well as for its conclusiveness on the topic of belligerent rights, I transcribe it.

"§ 25. A contest by force between different members of the same society or state, has sometimes been called a *mixed* war. Grotius regards such a war as *public* on the side of the established authorities, and *private* on the part of those who resist such authorities. Such a contest, on the part of individuals against the established Government, may be a mere insurrection or rebellion, and the acts of such *individual* insurgents, or rebels, in resisting or opposing the authority of the Government, may, as already stated, be punished according to the municipal law which they have violated; but where the contest assumes the character of a *public war*, as defined and recognized by the law of nations, it is the general usage for other states to concede to both parties the rights of war so far as regards the law of blockades, of contraband, etc. It must be remembered, however, that every insurrection or rebellion is by no means a public war, and a state which recognizes it as such, does so under the responsibilities which are imposed by the laws of international comity. It should also be remarked that, in such cases, *belligerent rights may be superadded to those of sovereignty*, that is, *the contending parties may exercise belligerent rights with regard to each other and to neutral powers, while, at the same time, the established government of the state may exercise its rights of sovereignty in punishing by its municipal laws, individuals of the revolting party as rebels and traitors.*" pp. 344, 345.

Your second citation of authority in support of the position that we cannot exercise the rights of a belligerent against the so-called Confederates, without implying that we thereby release them from responsibility to the laws of the United

States,—is from Wheaton. The entire paragraph which you quote in part, is as follows :

“ A contest by force between independent sovereign states is called a public war. If it is declared in form, or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. The voluntary or positive law of nations makes no distinction, in this respect, between a just and an unjust war. A war, in form, or duly commenced, is to be considered, as to its effects, as just on both sides. Whatever is permitted by the laws of war to one of the belligerent parties, is equally permitted to the other.” *Wheaton. Elements of International Law*, (Philad., 1846). pp. 342, 343.

If you had taken notice of the fact that the subject of Wheaton’s “ Part Fourth,” from which this quotation is made, is the—“ International rights of *states* in their hostile relations,” and that in the dialect of international law, our country is one *state* and not many, surely you could not have thought of citing this passage as having any relation to the question whether citizens of the United States, having made war upon their country, and being responsible to the military power as recognized belligerents, are therefore exempted from all responsibility to the civil power as traitors and criminals. I cannot see that in this passage, or in any other, Wheaton makes any allusion to that question. He does, indeed, refer, in the next paragraph, to the definition given by Grotius, of a civil war as “ *public* on the side of the established government, and *private* on the part of the people resisting its authority ;”—the very definition by which the most uncompromising enemy of the pretended right of secession would naturally describe the nature of the civil war now raging in this country—a public war on the side of the established Government, a private war, like any filibustering expedition, on the part of the so-called Confederates. “ But,” he adds, “ the general usage of nations regards such a war as entitling both the contending parties to *all the rights of war* as against each other, and even as respects neutral nations.” What else is this than the identical position which I assumed, and which you have undertaken to controvert? Your position that if the people of the United States have all the rights of a belligerent against the rebels and in the region occupied by the rebellion, they cannot at the same time have those rights of sovereignty over the

whole area of the Union which are the subject matter of the war,—is a position which, so far as I can discover, Wheaton seems never to have thought of.

Let me now illustrate, by a parallel case, my view of what our rights are, as a belligerent power, in the territory now occupied by our enemies. What if the pretended act or ordinance of secession in each of the rebel states had been immediately followed by a similar act or ordinance of accession to the French empire? What if the whole scheme from the first instead of being a conspiracy for the establishment of an independent and rival confederacy within the acknowledged area of the United States, had been a conspiracy to bring half of our country under the scepter of a foreign potentate? What if the traitors who seized forts, arsenals, mint, and custom-houses, in the name and for the use of the Confederate States of America, had done that thing in the name and for the use of Napoleon III.? What if the French tricolor were now flying wherever the flag of the rebellion is displayed upon our soil? What if Jefferson Davis, instead of styling himself "President of the Confederate States," were ruling at Richmond as the representative of the imperial power at Paris? In such a case the conflict would be, unquestionably, on both sides, a public war, "a contest by force between independent sovereign states:" and it would "entitle both the belligerent parties to all the rights of war against each other." My position is, that whatever our belligerent rights would be in such a case, those are our belligerent rights to day. In such a case the necessities of war would compel us, as the necessities of war in the present case have compelled us, to recognize captured traitors, while the war lasts, as prisoners of war to be exchanged or paroled instead of being indicted in the civil courts and hanged for their treason. If, in such a case, the expulsion of the foreign flag and the foreign power, and the consequent termination of the war, would be followed by the re-establishment of the constituted civil authorities; and if every citizen who has "levied war against the United States," or has "adhered to their enemies, giving them aid or comfort," would thereupon find himself liable to an indictment for

treason and to punishment by the civil power unless protected by an act of amnesty; then the same state of things will ensue upon the successful termination of this war. And if, in the case supposed, our Government, as a belligerent power, would have a right to use, within the territory occupied by the enemy, all measures of hostility, not excepting a proclamation of freedom to the slaves and the raising of an army of freedmen, if necessary to the speediest and most effectual termination of the war,—then, in the present case, our Government, as a belligerent power, has the same right.

What, now, is the bearing of your authorities on my position and on yours? The quotations you make may serve to throw a little learned dust into the eyes of unwary readers, and they may help the logical juggle by which one thing is adroitly shuffled into the place of another without awakening any suspicion in credulous souls; they may be available for the purpose of making “them that are unlearned and unstable” believe that black is white, and the wrong the better reason; but, on a careful examination, it appears that your authorities expressly testify to my position, and that concerning yours they say nothing. I do not reject your authorities as “law logic.” Sometimes it happens that the “law logic” is in the misapplication and misinterpretation of quotations from authorities. It occurs to me as not improbable that in the present instance you have been wronged by some clerk or pupil employed to make the needful citations. There is nothing disrespectful in such a supposition. Marshall, as I have heard, having determined what the law ought to be in a given case, was wont to depend on Story for the citations which were to prove what the law was. So Webster is said to have devolved upon his junior associates, in the trial of a case, the labor of hunting for authorities.

One of your letters (the fourth) assails my statement that “the territory held by the rebels must be recognized as hostile territory to be conquered and reannexed;” and that the work which we have now in hand is “the earnest reality of war to crush a powerful and desperate enemy—to regain by conquest a wide territory which has been wrested from the people of the



United States to whom it rightfully belongs—to establish the Constitution and the laws of the Union in regions over which, at present, they have no more sway or force than they have in Patagonia.” I will not dispute with you about the sense in which the territory in question “rightfully belongs” to the people of the United States; for, on that point, I do not see that you have really raised any doubt, and my meaning, I am sure, was sufficiently intelligible from the first. In whatever sense the territory included within the boundaries of Massachusetts or of Iowa belongs to the people of the United States, in that sense the territory included within the boundaries of Virginia or of Arkansas belongs of right to the people of the United States; and that is enough for the purpose of my argument. What you deny is, in your own words, “that any part of this territory has been wrested from the people of the United States.” You say,

“I maintain that there never has been a time since the rebellion commenced when the territory has not belonged to the United States in as full and ample a manner as it did before that period; that there has not been any time when the jurisdiction of the United States, political and legal, has not been as ample as it was before the first act of secession was passed, nor any time since when the laws of the United States have not been in *force* throughout the territory, precisely as they were prior to the insurrection; although, by reason of a treasonable and forcible opposition to their execution, the actual enforcement of them has been obstructed and prevented.”

Now in all this you strangely confound the very obvious difference between what is true in law and what is true in fact, or, in other words, the difference between what ought to be, and what is. Do you teach your pupils that if a client comes for legal advice and aid in order to be put in possession of a farm which rightfully belongs to him, but which is occupied and held by another claimant, he is only to be advised that inasmuch as his title is perfect, he *is* already in possession of the farm? In such a case, do you hold that because your client is of right the owner of the farm, he has no ground of action, and cannot sue for an ejectment? Is it worthy of your professional eminence to build an argument upon such a quibble as that the Constitution and laws of the Union are still “*in force*” throughout the area of the rebellion, though there is

no "actual enforcement" of them? They are in force, forsooth, but they are not put in force! If it comes to quibbles like that, please observe more exactly what I really said. Did I say that there is any portion of our country where the Constitution and laws are not in force? What I said was no more than what you yourself say when you admit that throughout those regions there is no actual enforcement of the laws of the Union,—in other words, that "the Constitution and the laws of the Union" are to be established "in regions over which, at present, they have no more *sway or force* than they have in Patagonia."

In other passages you say, by way of inference from the fact that the sovereignty of the United States is limited by the reserved rights of the several States.

"Of course there has not been,—there cannot have been, any wresting of the territory from the people of the United States, except that the rightful power which the United States might and ought to exercise under the Constitution, has been subverted, or rather suspended, for the time being, by force. And in that view, any *reannexation*—which by the way is a very inappropriate term—would be a restoration, so far as possible, of the state of things existing previous to the rebellion. But that would not be a 'conquest,' and the use of the terms 'conquest' and 'reannexation' serve to show that you mean something more than the mere restoration of the authority of the United States. It is apparent, from the whole tenor of your article, that you desire through *conquest* and *reannexation*, to accomplish something which could not be done by the mere suppression of the rebellion,—that is to say, the emancipation of the slaves. \* \*

"The fact that conventions of people, in the several [seceding] states, have adopted acts of secession, does not wrest the territory within those states from the United States. The acts of secession are void, and the sovereignty, jurisdiction, and authority of the United States remain as before." \* \*

"Do you not know that in thus asserting that the territory has been wrested from the people of the United States, and must be regained by conquest, and that the war must be waged for emancipation, you not only virtually admit that the ordinances of secession had validity, but that you make war upon the resolve of Congress, which I have cited above, [the manifesto of July, 1851], and commit a kind of petit treason against the 'great proclamation?'"

I have made these extended quotations, partly for the sake of saying to you, peremptorily, some things which I would not say without putting before your eyes the evidence which will justify me in saying them.

1. The inference which you make from my use of the words

"conquest" and "reannexed," namely, that I "mean something more than the mere restoration of the authority of the United States," is without warrant. Not only do I repudiate that inference as one which was not in my thoughts, but I deny your right to make it.

2. When you allege that I "desire through conquest and reannexation to accomplish something *which could not be done by the mere suppression of the rebellion*, that is to say, the emancipation of the slaves,"—and when you affirm that this "is apparent from the whole tenor of [my] Article," you not only misconstrue the whole tenor of my Article, but you do it with a violence, for which, I can discover no excuse. That I desire the emancipation of the slaves is most true. Wherever under God's heaven a human being is enslaved for no crime or fault of his own, my sympathies are with him, and I pray for his emancipation. If I did not desire the emancipation of the millions of human beings in the United States who are held in the lowest condition of bondage, robbed of their labor, sold like cattle in the market, subject to every wrong which the interest, the caprice, the fear, the suspicions, or the lust of an owner can inflict, shut out by law and popular hate or fear from all means and opportunities of acquiring knowledge, and denied even the poor hope of something better for their children, I should be "a worm and no man." If I could believe that you, born in New England, distinguished by gifts of nature, enlightened by education, and trusted and honored by your fellow citizens, do not desire the emancipation of the slaves, I should feel myself dishonored by any correspondence with you. There are those in New England and elsewhere in the North, who do not desire the emancipation of the slaves, but you will not acknowledge yourself one of them. You know who they are, and in your dispassionate moments you abhor them. They are the vilest and most unclean of knavish politicians, and the most unthinking of their dupes—creatures who wear the shape of men, but in whose gross and selfish hearts there is no pulse of genuine sympathy with wronged and suffering human nature—men, if we may call them so, who would rather give up the Union to dissolution and betray

our grand trust of constitutional self-government, than see the slaves emancipated. But much as I, in common with yourself and all honest men, desire the emancipation of the slaves, you wrong me inexcusably when you charge me with desiring to accomplish that end by any method of violence distinct from and superadded to the suppression of the rebellion and the restoration of the authority of the United States in the territory held by the rebel power. The whole tenor of my Article demonstrates to any reader that in my view the proclamation can be justified not for one moment on the ground that the emancipation of the slaves, and the full abolition of slavery, are desirable in themselves, and devoutly longed for by all generous souls; but only on the ground that the offer of freedom to the slaves held under the power of the pretended governments in the territory occupied by rebels, is a rightful measure of hostility in this war, and necessary for the suppression of the rebellion, and for restoring the legitimate authority of the United States.

3. When you allege that my views are at variance with the resolve of Congress, setting forth the causes and purposes of the war, and with the proclamation itself, you allege that for which you have no shadow of a warrant. If anything in my Article is intelligible, it is that the offer of freedom to the slaves now held in slavery by the declared and implacable enemies of the United States is to be regarded not as the object or purpose of the war, but only as a means to the object and purpose announced by Congress. Did I not expressly consider and refute "the complaint that the proclamation makes no profession of hostility to slavery, but emancipates the slaves only because emancipation is a necessary measure of hostility against the rebels"? What was the argument by which I answered that complaint? "The President has no right to emancipate any slave on the ground that slavery is wrong, but he has a right as commander-in-chief of the army and navy to proclaim the emancipation of slaves on the ground that their emancipation is necessary as a means of ending the rebellion."

4. Your argument that the territory occupied by the rebel forces has not been wrested from the people of the United States,

and must not be regarded as hostile territory to be conquered and reannexed, because if we so regard it we admit the validity of the pretended ordinances of secession, is of the same sort with your argument, already noticed, that because the laws of the United States *ought* to be respected and obeyed in those regions, it is wrong to say that they have no sway or force there. That a great extent of territory, wider than some of the greatest empires of the old world, has been wrested from the people of the United States to whom it rightfully belongs, is a notorious matter of fact which you undertake to argue out of existence by the consideration that it is against the law. As if, when a man has been shot down in the street before my eyes, and I see him laid stark and stiff, I must not believe the fact, because the assassin had no right to kill him. Could any murderer be convicted of his crime, if the fact of the homicide could not be asserted without implying an admission that the homicide was lawful? The ordinances of secession were unconstitutional, invalid, null and void *ab initio*; but the stubborn fact happens to be that the territory in question is held and occupied by the belligerent enemies of the United States, and must be recovered by feats of arms, (that is, by conquest) before the fact and the law will be at one.

All this remarkable argumentation of yours is employed to refute my position that the territory which the belligerent enemies of the United States hold by military strength, is to be regarded as hostile territory. But, as it happens, you cite no authority in confirmation of your argument. What does Gen. Halleck say on this point?

"Any place, port, town, fortress, or section of country occupied by the enemy, is, for most purposes, regarded in law as *hostile territory* so long as such occupation is continued. If the place so occupied were previously neutral or a part of our own territory, it is no longer regarded as such, for it would be absurd to suppose that persons who are hostile themselves, or who are under a hostile authority, are to exercise the same civil rights as neutrals or citizens in time of peace. The relations of the government to a place or territory so occupied or situated, are of a military character, and consequently are not regulated by the civil laws which are made for the condition of peace. This change of relation, or rule of government, does not result from anything in the particular constitution or laws, but from the *fact* of the existence of war, and the hostile occupation of the place." Halleck, pp. 371, 372.

Considering your professional deference to authorities, and that Gen. Halleck is an authority referred to by yourself, I do not see that anything more need be said, just now, on this part of the subject. The conclusion seems to be that whatever the President, as wielding the military power of the United States, might do in Florida, if that State (as we call it) had never ceased to be a dependency of the Spanish crown, and if we were at war with Spain, just that is what he may do in Florida now, and just that is what he may do throughout the territory held by the rebels. Every State or portion of a State held by the enemies of the United States is hostile territory, and is to be recovered from those enemies by the use of every hostile measure and expedient, not contrary to the laws of war, that may be found needful to the end in view.

Do you hold that this particular expedient—a proclamation offering liberty to all persons held in slavery by the enemy—is contrary to the recognized laws of war? I will not affirm that you do, and yet I dare not say, on the other hand, that you frankly acknowledge the legitimacy of this measure in war. I cannot deem it superfluous to touch upon the question whether, admitting that, in the present conflict, the United States are invested with full belligerent rights against the rebellion, and admitting that the territory held by the rebels is, for the time being, hostile territory,—a proclaimed offer of freedom to all persons held in slavery by the rebel power within that territory, is contrary to the law of nations and the laws of war.

The first thing to be remembered, in dealing with this question, is, that it is not a question about the ownership of real estate or of chattels, but a question about the rights and duties of persons. As in the view of the Constitution, so in the view of international law, slaves are persons and not things. Before the law of nature, the slave and his master are equal. The difference between them, in respect to rights, is a factitious difference created by arbitrary power, and not to be recognized save within the jurisdiction of the arbitrary power by which it was created. In the presence of war, the slave of an enemy has all the rights of an enemy if he takes his master's side,

and you have the same rights against him that you have against his master. You have the same right to shoot him that you have to shoot his master in the same circumstances; you have the same right to take him prisoner that you have to take his master; and when he is your prisoner he has the same right with his master to honorable treatment. On the same principle, if you can induce him to take your side, he is entitled to all the rights of a friend; and if there is any offer or pledge, not inconsistent with humanity and natural justice, by which you can induce him to take your side, you have a right to employ that inducement. Had not so many of our politicians—and, I am sorry to add, so many of our lawyers—fallen into a perverse habit of assuming that slaves are always to be considered as property and not as persons, these propositions would seem too much like truisms to need any proof from argument or from authority.

The millions then of human beings who are now held in slavery under the pretended authority of the usurping governments within the area of the rebellion—what are they? Not so many millions of property in the hands of private owners, but so many millions of a wronged and subject population who are the natural enemies of our enemies, and who therefore ought to be our friends. The question is whether the President, wielding the military power of the nation, may rightfully, under the laws of war, invite them to become our friends, and may strengthen the invitation with such offers of protection and of liberty as shall secure their confidence. If we were at war with the Austrian empire, and our armies were marching upon Vienna, might we rightfully call on the oppressed and discontented populations of that empire—Poles, Servians, Magyars—to become our friends, proclaiming ourselves their liberators, and pledging the honor of the United States for their protection? I will not say that common sense can answer the question. Let me refer you to a most respectable authority. If you will turn to Gen. Halleck's chapter on "Means and Instruments of War," you will find him saying,

"§ 29. It sometimes happens in war that intestine divisions prevail among the enemy's forces, and that one party may favor the objects for which we are con-

tending ; in such cases we may, without scruple, hold correspondence with the one faction, and avail ourselves of its assistance to overthrow the other party. We thus promote our own interest and gain the objects of the war, without seducing any one to crime, or even becoming the partakers of treachery. The right to side with a faction in war is broadly different from the pretended right of forcible intervention in time of peace. A third party may side with the one or the other of the conflicting forces, just as he might in a war between separate and independent nations. If he have just cause of war against one of the parties, he may avail himself of the assistance of the other." p. 410.

If we may thus take advantage of divisions "among the enemy's forces," and may even invite his discontented regiments to come over and fight on our side, pledging ourselves to make common cause with them against the common enemy ; how much more may we take a like advantage of divisions among the population under the power of that enemy, inviting the oppressed to receive us as their liberators, and guaranteeing to them whatever relief from their burdens may be necessary to secure their hearty coöperation and their lasting fidelity.

You will not argue that in the case of our enslaved population there is a peculiarity which should restrain us from inviting them, by offers of freedom and protection, to become our friends in a war with the power that oppresses them. On this point the authority of Jefferson is quoted by Mr. Whiting. I take the liberty of repeating the quotation. Writing about the military operations of Lord Cornwallis in Virginia, Jefferson said,

" Having first taken what corn he wanted, he used, as was to be expected, all my stock of cattle, sheep and hogs for the sustenance of his army, and carried off all the horses capable of service. He carried off also about thirty slaves. *Had this been to give them freedom, he would have done right.*"

I have happened to light on another authority from the Virginia of the Revolution, when the Old Dominion had great men. George Mason, the grandfather (I believe) of the rebel emissary now at London, said in the Convention which formed our Constitution,

" The evil of having slaves was experienced during the late war. Had slaves been treated as *they might have been* by the enemy, they would have proved dangerous instruments in their hands. But their folly dealt by the slaves as it did by the Tories."



But this citation of authorities is hardly necessary. The great testimony of John Quincy Adams concerning the belligerent right of proclaiming liberty to the slaves of an enemy is enough, and it is well known not only to those who remember the two several occasions on which it was uttered, and who have never forgotten what light it threw on the destiny of slavery in this country, but also to thousands of younger men. It was my purpose to transcribe his testimony at large, but the necessary limits of this letter, already too long, forbid me to do what I intended. Large extracts from the two speeches—six years apart—in which that most learned and accomplished statesman demonstrated, to the conviction of all thinking men in those days, what the powers are, in relation to slaves and slavery, with which an invasion and occupation of the slaveholding country by enemies of the United States must needs invest the national government,—are given by Mr. Whiting, pp. 75-82. The speeches are found entire in the Congressional Globe. 1 Sess. XXIV Cong. App. pp. 433-435; and 2 Sess. XXVII Cong. App. pp. 426-429. You cannot forget, nor can you contradict, though you are careful not to quote, the terrible expression which the sagacious and eloquent old man thundered into the astonished ears of the House of Representatives in 1836. “*From the instant that your slaveholding states become the theater of a war, civil, servile, or foreign war, from that instant the war powers of Congress extend to interference with the institution of slavery in every way in which it can be interfered with, from a claim of indemnity for slaves taken or destroyed, to the cession of states burthened with slavery to a foreign power.*” You have quoted—and let me assure you that the people have not forgotten and will never forget, his reiterated declaration in 1842, (never contradicted till now), “*that when a country is invaded, and two hostile armies are set in martial array, the commanders of both armies have power to emancipate all the slaves in the invaded territory.*” I need not recite the historic instances which he adduced in confirmation of that statement. Let it suffice to write down here these emphatic words sanctioned by the most authoritative name in the history of our country,—“I lay this down as the

*law of nations.* I say that military authority takes, for the time, the place of all municipal institutions, and slavery among the rest; and that under that state of things, so far from its being true that the States where slavery exists have the exclusive management of the subject, *not only the President of the United States, but the commander of the army*, has power to order the universal emancipation of slaves."

In strict conformity with the law of nations, considerably and solemnly announced by John Quincy Adams, the President has "ordered the universal emancipation of slaves" in all the territory of the United States now held and occupied by a hostile military power. With a careful deference to state rights he has done far less than this authority assures us he might have done. Wherever there is any shadow or pretense of a state government acknowledging the Constitution as the supreme law of the land—wherever there is even a provisional government not at war with the United States, he has refused to interfere with the institution of slavery. But where there was, on the first of January, no government whatever, recognized by the United States, and therefore no government by which any portion of the population can be divested, in law, of any human right, there he has ordered the universal emancipation of slaves. Had he a right to do so in the exercise of the powers with which he is constitutionally invested in time of war? You have shown your discretion in argument by avoiding a direct conflict with the authority of John Quincy Adams on this point. It suited your purpose better to assail the Proclamation with carping questions and criticisms about its effect now and after the war shall have ended.

For example, you profess to be sorely puzzled "respecting what it proposes and is intended to accomplish." You inquire whether the President intends merely to threaten the rebels, and you make a somewhat unfortunate attempt to ridicule the Proclamation in that view. After saying that your dog, if you had one, might bark at the moon, you proceed as follows:

"The President may notify Queen Victoria that if she does not return Mason and Slidell within ninety days, he will proclaim in what part of her Indian dominions the Sepoys shall be emancipated from the oppression to which they are

subjected. I doubt whether he would be liable to impeachment if he should do such a foolish thing. But would her Majesty be very much alarmed by the notification except as it indicated hostility? And if he should designate the limits, at the end of the ninety days, would the Sepoys be relieved from the oppression?"

The Sepoys! Perhaps it may relieve your sympathies to be informed that the Sepoys are neither slaves nor otherwise oppressed. They are nothing else than soldiers, of a dark complexion, voluntarily enlisted in her Majesty's service for the support of her imperial government over their native country, wearing her uniform, and regularly paid with her money. Whoever else may be oppressed in her Majesty's Indian empire, the Sepoys are not oppressed. Their wild and atrocious mutiny, a few years ago, was almost as inexcusable and insane as the secession of South Carolina. Allow me to suggest that a lawyer whose studies have been so exclusively professional that he does not know the meaning of the word Sepoy, may be justly eminent in his profession—may be what Bartholine Saddletree would call "*a clarissimus Ictus*," but he has little occasion to crow over the ignorance of clergymen in matters not pertaining directly to their profession.

Let me show you what your supposed case should have been, if you desired to make it in any degree analogous to the case in hand. If we were engaged in a desperate war with Great Britain, if India were considered to be the most vulnerable portion of the British empire, if we had an immense armament in the Pacific ready to be precipitated upon the enemy at his weakest point, and if it were known that a blow at India would enlist the sympathies of all Europe on our side, then the President might proclaim that unless peace should be restored in ninety days he would carry the war into India, and recognize the freedom and independence of the subjugated races there. Can you understand what would be the intent and bearing of such a proclamation?

You affect to inquire whether the Proclamation is to be regarded "as a measure of punishment;—as a confiscation of slaves for the crime of rebellion or treason?" Certainly you are at liberty to call it "a measure of punishment," if you please, though it is not punishment in the sense of the courts

of law. It is punishment of the rebellion in the same sense in which the blockade is punishment—in the same sense in which the turning of the Mississippi from its channel, and the deluging of a territory larger and richer than many an old-world principality, are a punishment. It is a measure of hostility against the implacable enemies of the United States,—who have established themselves upon our soil by military violence, and who are at this moment occupying a large portion of our territory,—a measure designed to weaken them, to distress them, to subdue them, and to expel them forever from our country.

The immediate effect and bearing of the proclamation as a measure of hostility seem to me quite intelligible. (1.) Wherever our military power shall be established within the area of the rebellion as it was defined on the first of January last, the freedom of every inhabitant, without distinction, is to be immediately recognized by all military and naval officers and by all persons under their command or control. (2.) Wherever the rebel power which now holds the slaves in subjection shall be expelled by victory, the provisional military government which must needs come in its place will recognize no man as the owner of another, and will admit into its administration of justice no violation of the principle that the laborer is worthy of his hire. (3.) In all capitulations for the surrender of towns and districts heretofore held by the enemy, whatever the stipulations may be in behalf of private property, there will be no stipulation by which any man will be recognized as the property of another, or which shall compromise the liberty of those whom the proclamation pronounces free. (4.) Through all the waning fortunes of the rebellion, the holders of slaves and the non-slaveholding whites, throughout the rebel states, will understand that the military power of the Union has recognized their slaves as men, whose wrongs are to be considered and whose inalienable right to liberty is to be secured in the final adjustment of the conflict. (5.) What is of more consequence than all the rest is that the slaves and the free black people who heretofore have had no interest in the restoration of the Union, have now the greatest possible interest in our success. For example, at the commencement of the war, there

was, in the State of South Carolina, an aggregate population of 703,708, of whom only 291,388 were white in law. The remaining 412,320 (including 9,914 free blacks or people of color) had indeed a contingent and conjectural interest in the conflict, for their instincts taught them that God might have sent in that awful whirlwind the angel of their deliverance. They had, therefore, an interest in the conflict, but they had no interest in the restoration of the Union. Nay, their interest was really adverse to such victories on our part as would have crushed the rebellion in its earlier stages. They could understand (what you recognize as an inevitable incident of the war) that, during the continuance of hostilities, as many of them as might come within our lines, though liable to indignity and cruelty from a certain class of soldiers and officers, would probably not be returned to our enemies, and would perhaps in some way acquire their freedom. But to them our early and complete success would be (as you think that constitutionally and legally it ought still to be) the closing of that door of hope. Here then is the force and bearing of the proclamation as a measure of hostility against the rebellion. It gives to the more than four hundred thousand slaves and free people of color, in South Carolina, a far greater interest in the suppression of the rebellion and the restoration of the national authority, than the less than three hundred thousand white people can possibly have in any other result. Its bearing is the same in other States.

It seems to me that this very simple view of what the proclamation is in its present effect and bearing, as a measure for the conquest of the rebellion and the restoration of the Union, refutes the entire argument in your sixth letter, which has had the honor of being circulated as a tract under the patronage, as I suppose, of the Delmonico Society for the diffusion of sound political knowledge. Surely if the proclamation has an obvious and most important relation to the progress and the early termination of the war—if it has an effect not only within our military lines but far in advance of our armies—if it facilitates all our hostile operations by giving us some millions of most interested friends in the territory held by our enemies—the entire argument which you build on the assump-

tion that the proclamation is to take effect only after the close of the war, must fall to the ground.

As to what will be after the war is ended, and particularly how the legal *status* of those who have been slaves is to be adjusted without infringing the reserved rights of the States under the Constitution, allow me to say that I think you need not be troubled. The end is not yet; and this is eminently one of the cases in which it is wise to "take no thought for the morrow," and in which "the morrow will take thought for the things of itself." Many things will have come to pass before the rebellion will have been finally disposed of, and the territory it has ravaged be restored to the Union and subjected to the normal and peaceful administration of government. You see what has happened in West Virginia, where the people, finding themselves emancipated by war from the domination of the slaveholding interest, have freely decreed, in their recovered sovereignty, the abolition of slavery. Just that thing you may be sure will happen elsewhere in the process of reëstablishing the Union. For example, when the rebellion shall have been extinguished in Virginia, and a loyal convention of delegates from the people shall sit in the capitol at Richmond to reorganize the State after so long an interregnum, think you that Letcher, and Wise, and Mason, and others like them, will have seats in that convention? Not at all! Before such a convention can be elected, the loyal people in Virginia will have accepted the emancipation of the slaves and the final abolition of slavery as inevitable facts; and the whole race of aristocratic conspirators against liberty, who have brought such shame and suffering upon that once illustrious State, will have become forever infamous there. Please to recollect that there is already a Governor of Virginia who is not Letcher, and who is recognized in that character not only by the President, but also by the Senate and the House of Representatives. When the Government *de jure*, now represented by Governor Pierpont at Alexandria, or some more obscure locality, shall have become the government *de facto* at Richmond, there will be no quarreling with the stubborn fact that the emancipation of the slaves has been an incidental yet

inevitable and irreversible result of the war. In that regenerated Virginia, baptized and purified with fire, the reserved right of the State to determine the legal condition and relations of its inhabitants will not be employed in the insane attempt to obtain a perpetual entailment of poverty and barbarism by reënslaving an emancipated peasantry.

Think what must be the process of restoring the Constitution, and reëstablishing the constitutionally guaranteed form of government, and the constitutionally limited sovereignty of the State, in South Carolina. First, there must be a provisional military government, under which no question will be raised whether the military emancipation of the slaves, as proclaimed on the first of January, 1863, was valid. Regiments of freedmen, under a rigid military discipline, will garrison the forts, will guard the custom-houses, will protect the cities against insurrection, and will ensure public order. A new population, with new capital, new ideas and habits, will begin to take the place of rebels, banished or emigrating in disgust. Slowly and quietly, thought, speech, industry, enterprise, domestic arrangements, and all the relations of society, will begin to be adjusted to the new basis. Instead of the relation of owner and slave there will spring up the relations of landlord and peasant, of employer and employed, of master and free servant. If some of the freedmen become disorderly and fall into habits of idleness and vagrancy, the provisional government will deal with them and make them know that their subsistence is to be earned by their labor. While these processes of adjustment are going on, every month and every week will diminish the possibility of even an attempt to reëstablish slavery. And whenever the time shall have come for a convention to reconstitute the state government, the liberty of those who were once slaves will have become an immovable fact to which the policy of the restored and reëstablished State will be freely adjusted, even though the adjustment be attended with regrets for the system that has perished. The process of reënslaving, after the return of peace, a population that has been emancipated by war, has not often been attempted; nor am I aware that its success in any instance has been such as to encourage a new experiment in that direction. The prospect of that "good time coming" which you seem to anticipate so cheerfully, when

the rebel states, restored to their places in the Union, shall enter on the enterprise of reducing to slavery again the millions emancipated by the military power of the nation, does not impress me as particularly brilliant.

I do not forget the possibility that another President may repudiate the pledges which President Lincoln has given. I do not forget the possibility that a future Congress may depart from the policy sanctioned by the one which has just expired. Nor do I forget the possibility that the question whether the people to whom the proclamation offers freedom are legally free, may be brought to an issue in the Courts of law. Doubtless an unprecedented crop of law suits will be among the consequences of this war, and you may reasonably expect that some litigated case may turn upon that question. If such a case were to be decided by the same judges who falsified law and history for the sake of denying justice to Dred Scott, it would probably be decided to your satisfaction. But the Supreme Court of the United States is not now, and will never again be, what it was when Judge Curtis threw off his judicial robe and resigned his seat in disgust. Certain preliminaries too must be transacted, before the question of dooming to slavery the millions to whom the proclamation offers liberty can be judicially decided. The war must be ended. The republican form of government guaranteed by the Constitution must be established in the States whose government under the Constitution has been abolished for the time by the enemy. These preliminaries will not be completed without taking time. After that lapse of time, the Supreme Court will be, yet more than now, unlike what it was when, to mark the inauguration of President Buchanan as an epoch in our history, the Dred Scott decision, having been prepared for the occasion, startled the country like an earthquake.

I cannot think that you are really expecting to see the legal invalidity of the proclamation established by any such method. Does not your argument assume rather that the war is to be ended by negotiation and compromise, and that the reënslaving of the emancipated millions is to be part of the bargain? I have never intimated—nor do I now imply—that you are one of those traitors at heart who are laboring to save the rebellion



from its fate by compelling the Government to negotiate for a peace. But, as I have already said more than once, there are such men. Do you ask me who they are? They are the men who in their conventions resolve that the Constitution has been violated by the admission of West Virginia as a State, because, forsooth, though the loyal legislature of Virginia which the Government has recognized in every way, and which has sent two senators into Congress, gave consent to the division of their State, John Letcher and the parliament of traitors over whom he presides at Richmond have not consented. I do not charge that you are one of them, for you seem to hold that the loyal citizens within the boundaries of a rebel State are the State, and that though they be no more than two or three in number, their rights and powers, as a State under the Constitution, are never in abeyance. Yet your argument seems to expect that the war is to terminate in some other way than by the conquest and complete subjugation of the rebels. If we are to have a Congress which will stop the supplies, which will compel the President to negotiate for a suspension of hostilities till the rebels can take breath, which will permit the rebel power to be represented by delegates in a convention called for the purpose of revising the Constitution and reconstructing the Union, I can suppose that the proclamation will pass for nothing, and that your questions about its effect on the legal *status* of the slaves now actually held by the so-called Confederates will be considered unanswerable.

You take it as a personal wrong to yourself when I say, of the men who are thus endeavoring to obtain peace by negotiation and compromise between the United States and "the Confederates," that they "expect nothing else, and intend nothing else, than some concession to the rebels which shall either divide the Union or subvert the Constitution." I have disavowed, more than once, any intention of putting that imputation upon you. But let me, in closing this letter, commend to your serious attention the dire alternative to which you and I, and all our fellow-citizens of the United States, are brought. Either this great and persistent rebellion must be crushed, completely and finally, by war; or we must make a compromise with it, and take such terms of peace as we can

get. The question comes to every citizen—and let me say, respectfully, it comes to you, Which side of this alternative do you take? To end the war by negotiation and compromise is to despair of the republic. It is to concede the principle that a party, or a combination of interests, which cannot achieve its wishes by votes, may resort to arms. It is to abandon the primary idea of our national self-government. Peace by such a method is the ruin of the republic founded by our fathers. Are you for such a peace? If you are the man I suppose you to be, you abhor the thought.

The other side, then, of the alternative, is your position. You are for crushing this rebellion, completely and forever, by prosecuting to the end the war which it has inaugurated. But let me say that it becomes you, as a man of practical sense, to understand that this war cannot be prosecuted to a successful result by any half-measures of hostility. Half-measures in war are cruelty as well as imbecility. They are treacherous to the cause in which they are employed. I have lately heard a story of a good old woman in the revolutionary war, whose son was drafted for a soldier, and who charged him, as she buckled on his knapsack, "Now, Johnny, do you take care that you don't exasperate the enemy." Let us be thankful that our old women in these days, with the exception, perhaps, of some whose garments are made by tailors and not by mantua-makers, have better sense than that. Within the last two years, we have learned—all of us—that if we would bring this war to an early and prosperous close, if we would save and perpetuate our republic, with all those interests of universal humanity and of the kingdom of God among men which are involved in the well-being of our nation, it must be war in earnest, and must use every instrument and method of hostility not forbidden by the rules of civilized warfare. It is too late in the day for Johnny, whoever he may be, to come from his mother with the sage counsel that this or that expedient of lawful war must not be employed for fear of exasperating the enemy.

You have been kind enough to bestow upon me much of the wisdom and learning acquired in your profession. Though I can make, from my poverty, no adequate return of professional

lore, I may say that my studies, which are in kind the studies proper to every Christian, have accustomed me to think of this national agony as related to interests that transcend the sphere of jurisprudence. That the hideous injustice which has been heretofore the basis of society in so many of our States, should stand forever, was impossible; because there is a God whose providence governs the world in the interest of righteousness. Had a peaceful reformation been permitted—had the free thought and speech, the free press, and the free self-government of the nation been permitted to grapple with the local wrong—that wrong might have yielded to the gradual and peaceful force of moral influences. But no such reformation was permitted. Year by year the stupendous iniquity, defying the moral sense of the world, and reeking to heaven, has grown more insolent, more rapacious, more atheistic. Meanwhile the mysterious forces which God has incorporated with the being of human society, and of which in their action and reaction all human history is the record, have been slowly working; and now we see the beginning of the end. The great day of God's wrath against that wickedness has come. In his righteous providence the system of organized wrong which those States have permitted to rule over them, has wrought out a natural vengeance on them and on itself. It has involved them in the miseries of a war which never can end till the iniquity itself has perished. In that war we are simply defending ourselves, our laws, our national unity, our Constitution, our glorious heritage; but we cannot defend ourselves, we can not leave this goodly heritage to our children, without doing God's work of vengeance. The vengeance is not ours but his. We have assumed no right of intervention in the long-pending issue between the oppressors and the oppressed, but God has shut us up to the necessity of doing his work. If we quit ourselves like men in the great agony of this crisis—if we do, in all fidelity and fearlessness, our own work of self-defense—if we do not basely betray our country to its enemies—the slaves cannot but be emancipated.

Respectfully, your obedient servant,

LEONARD BACON.

NEW HAVEN, CONN., March, 1863.









**Revolution and Reconstruction.**

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**TWO LECTURES**

**DELIVERED IN THE**

**LA W SCHOOL OF HARVARD COLLEGE,**

**IN**

**JANUARY, 1865, AND JANUARY, 1866.**

**By JOEL PARKER,**

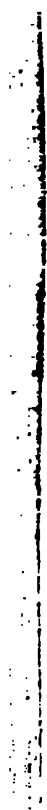
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# REVOLUTION AND RECONSTRUCTION.

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## LECTURE I.

DELIVERED JANUARY 27, 1865.

GENTLEMEN OF THE LAW SCHOOL :

I have heretofore taken occasion to say, that I had for a time some hesitation respecting the expediency of discussing, in the Lecture-room, topics of present interest on which men differ widely, and respecting which some of you may have strong as well as diverse opinions. But no little consideration of the subject has led me to the conclusion, that it is not only expedient, but that it is a duty which I owe to the School, to lay before its members such legal views and opinions as my studies have led me to entertain respecting the fundamental principles of the government under which we live, and the application of those principles to the momentous questions of the day; notwithstanding the diversity of opinion which exists. And, under that conviction, I have more recently spoken freely respecting questions of Constitutional Law, urging, in some instances, legal views in direct opposition to the dogmas of the different political parties.

I shall trust to your candor to justify, or at least to excuse, as free a discussion of the subject-matter of the present lecture, even if some portion of it may not be so exclusively legal in its characteristics. That part is so connected with the legal discussion, and so prominently before the people at the present time, that it may not well be omitted.

My subject is *Revolution* and *Reconstruction*, and belongs appropriately to my course upon Constitutional Law.

Whether we admit it or not, whether we perceive it or not, we are in the midst of a double attempt at revolution.

One attempt is the rebellion of the people of the Southern States, by which they have hoped to dissolve their connection with the United States, and to establish a separate independent Confederacy.

The other is the attempt, of persons who appear to control the majority of the Northern States, to make this war one which shall change the laws and institutions of the seceding States, so called, by the abolition and prohibition of slavery; and to do this in those parts of the country still held by the rebels, against the will of the people there, by the exercise of some power for that purpose, operating beyond the mere power of force by and through which the war is waged; or, in other words, in some mode beyond the liberation which is effected by the armies in the field.

Both parties claim a right to execute their purposes consistently with the provisions of the Constitution.

The one party argues that the Union was but a confederation of States, each having the power to judge when and for what causes it should dissolve its connection with the others; so that secession is but a peaceful dissolution of a compact between States, which compact each State has the right for itself to dissolve at pleasure, and that the war which is waged against secession is unjustifiable.

The other party, denying the right of secession, and maintaining that the attempt to secede is rebellion, and if successful, revolution, has adopted, as an incontrovertible truth, that slavery is the root and cause of the rebellion; and that in order to suppress it, we must extirpate the root and destroy the cause. And the argument is, that there is therefore a constitutional right to effect that object, by the exercise of the power of the government of the United States, under the Constitution as it at present exists.

This assertion, that slavery is the root and cause of the war, is received as a great political truth by very many persons who fail to perceive that if it were true, the argument and conclusion founded upon it by no means follow.

The argument which attempts to maintain that secession is constitutional, is simple in its statement, although founded on

false premises and illogical in its conclusion. Assume that the Constitution is a compact, any infraction of which will dissolve the obligation of it, and it might follow, that as there is no common arbiter, each State must judge for itself when the contract is broken, and may proceed to a separation by an act of secession, were it not that on the assumption of such a compact, every State must have a similar right to judge whether there had been a breach, and if some, a majority at least, should determine that there had been no infraction, no case could arise for the exercise of the right to secede. The majority of the States, if not each State, would have at least an equal right to decide that the compact had not been broken, as any one could have to determine that it had been ; and so the decision of one State that it was broken, would be negatived by the determination of others that it was not. — But, besides this, the premises are entirely false. The Constitution is not a compact in any such sense as this argument assumes. It is a misuse of terms to call a fundamental law a compact.

The argument on the other side is not quite so simple. In fact the various, and to some extent contradictory, reasons urged, serve of themselves to cast some suspicion over the soundness of it.

Assuming that slavery is the root and cause of the rebellion, the constitutional power to abolish it, by any exercise of the authority of the United States, is not apparent from that fact merely ; and the advocates of the constitutional power are by no means agreed upon the clause of the Constitution which authorizes the abolition, the instruments by which it is to be made effectual, or the manner in which it is to be accomplished.

The position that slavery is the root and cause of the rebellion will not bear a critical examination. Other things have had a more direct influence in producing the rebellion than slavery, which, however, has been made the prominent pretext.

If there had been no unhallowed ambition of persons, no lust for political power, no antagonistic industrial interests, and no sectional rivalry and hatred, slavery would not have caused a rebellion. Undoubtedly it may have had an influence, remotely, in producing or fostering some of the more direct motives and inducements which led to rebellion.

But if it be assumed that slavery was the root and cause, we

by no means reach the conclusion that there is any constitutional power in the United States government to destroy it, except by an amendment of the Constitution.

It does not follow, that in order to suppress a rebellion, or even to provide against the recurrence of one, the root and cause of it must be extirpated.

It is well known that we were almost on the eve of a rebellion, by South Carolina, in 1830. The root and cause of that rebellion, if it had broken out, might, to a superficial observer, have appeared to be the tariff, and unquestionably the tariff would have held the same relation to that war, had it occurred, that slavery holds to this, so far as regards the cause of it.

But no adherent of the administration, at that day, would have promulgated the doctrine, that to suppress the rebellion and provide for the future, we must destroy the tariff.

And should slavery be now subverted, and the southern States continue the production of cotton, with the profit heretofore derived from its culture, which, it is stoutly maintained, may be done with free labor; it must be quite evident, that when the South is filled with free laborers, the antagonistic industrial interests of the two sections may (though perhaps not in our day) cause another rebellion at the South, all the more successful, because, with a population of free laborers, it might be madness on the part of the North to resist such an attempt at revolution.

The attempt of the South to secede has not been placed upon the ground of that intolerable oppression which justifies a forcible disruption of the government, contrary to the provisions of the Constitution; in other words, by a revolution.

And so, on the other hand, the effort to abolish slavery has not been placed upon the ground that the unwarrantable attempt at revolution by the South justifies a counter-revolution, which shall effect such a change in the institutions of the southern States as will leave no longer an inequality in the representation in Congress, and which shall remove all further controversy about fugitives from labor, and about the alleged right of southern masters to introduce and hold slaves in the territories of the United States, and to hold them temporarily in the free States. These things, although not the root and cause of the rebellion, were, to a very considerable extent, the pretext

for it, and the means of excitement relied on to "fire the southern heart" and accomplish a union among the southern people not otherwise attainable. The strenuous effort to secure the introduction of slavery into the territories, was not so much because it was supposed that the industrial interests of the South required that measure, as it was because the political power of the South was in danger, unless slave States could be created fast enough to counterbalance, in the Senate at least, the increase of free States.

And there would certainly have been some color of reason, in making the rebellion the occasion for a counter-revolution, which should relieve the Union from an inequality of representation, the consideration for which had entirely failed because the corresponding burden of taxation was not borne by the States which had the advantage of the inequality, the revenue of the country being provided for by other modes than direct taxation; and should likewise remove a cause of dissension between the sections, which though not the cause of the rebellion, had been the means of procuring very substantial support for it.

It might well have been urged also, that such a counter-revolution was but a just punishment for rebellion. Regarded as a punishment, whether any measures should be devised to prevent it from falling upon others than the guilty parties, as by compensation for emancipation, or otherwise, might be the subject of further consideration.

The great objection to an open attempt at a counter revolution, of such a character, would be, in my view, its tendency to give success to the rebellion itself, by causing more united and persistent efforts to resist such a subjugation of the southern States.

God forbid that I should be supposed to entertain any sympathy with slavery. I desire to record my utter detestation of it, in all its forms, whether it be the black slavery of the southern States, the coolie servitude of the kidnapped Chinaman, or the more odious because more mischievous, white slavery which results from the voluntary surrender of the conscience, and all the faculties of the mind, to the uses and purposes of a political party; so that the slave to party neither sees, nor hears, nor thinks, except as the leaders of the party



direct, and to all human appearance has no soul to be saved, except a party soul, not worthy of salvation. Whether this form of slavery results from an inordinate desire for the supposed honors, and the actual spoils, of office; the hope, or the enjoyment of profitable contracts; or from passion, prejudice, and ignorance, it is the most mischievous form of slavery which can exist in a republican government, be the other what it may. The horrors of this slavery outmatch those of African bondage. I do not pause to describe the original surrender to captivity, the dreadful "middle passage" in which conscience is stifled and political rectitude thrown overboard, or the infamy of the servitude to which the partisan is subjected, or subjects himself, when he becomes the mere tool and slave of leading politicians, instead of a thinking, reasoning, free-acting intelligence, worthy of a liberty of which he can make use for the benefit of mankind. I commend to your special scorn and detestation all slavery, and especially this form of it.

All legitimate and lawful efforts for the destruction of political slavery, by the curtailment of patronage, the enforcement of official accountability, the punishment of bribery and malversation in office, the security of the freedom of the ballot, and the diffusion of knowledge and of sound principles, have my unhesitating and unwavering commendation and support.

And constitutional, lawful and proper measures, which shall tend to the extinction of African slavery, have in like manner my heart and hand, tongue and pen, if it may be, to speed them to their ultimate success.

To that emancipation, through the operations of the war, which practically severs the relation of master and slave, and removes the latter from the jurisdiction in which he has been enthralled, I perceive no constitutional objection. It is one of the incidents of a state of warfare, arising out of the rebellion; and cases of that character cannot fairly be regarded as within the scope of the constitutional provision for the rendition of fugitive slaves; for when the relation of master and slave is actually severed by the war, the slave may go where he will, and cannot be regarded as a fugitive.

To an amendment to the Constitution, which shall in the most expedient mode, terminate African slavery, with due re-

gard to the welfare of the slave, I give my most hearty support; believing that the people of the United States, when they formed the Constitution, might have inserted such a provision into that instrument, and of course that it is within their power to supersede the State authority, and the State laws, in that respect, by an amendment of that instrument according to the modes and forms therein prescribed. If the rebellion has made the adoption of such an amendment practicable, as it would not now have been but for the rebellion, it is one of the very few good things which that ill-advised and wicked measure will have accomplished.

I favor no proposition to rebels in hostile military array against the United States and the Constitution, or any peace except upon the condition that they first lay down their arms, and submit themselves to the lawful authority of the Government, upon a proper amnesty. I do not allow questions of expediency to intervene, and prevent the assertion of the rightful supremacy of the nation, by such force of arms as shall give no encouragement to another rebellion without sufficient cause. On the question whether the war shall be prosecuted vigorously, on the basis of the resolution of Congress, to compel unqualified submission, and restore the constitutional rule of the United States, my answer is an unhesitating affirmative; and I am ready, if need be, on that issue, to take the field and render such service as I may. It is only when the question comes, whether we shall intermix with that, other issues, which may render our success doubtful, and perhaps insure the triumph of the rebellion, and with it the establishment of slavery beyond our possible control, that I dissent.

I shrink also from revolution, masked under the cover of an assumed constitutional authority, derived from false constructions of the Constitution. I start back from the abyss which yawns before us, when with a country of such extensive limits and sectional prejudices, of such varied, and to some extent conflicting, interests, of such diverse modes of thinking and feeling, we lay a sacrilegious hand upon the fundamental law, which made us, for certain great national purposes, an entire people, — upon the ark of salvation which received our fathers into its safe keeping, when the deluge of anarchy was rising around them, and seemed about to overwhelm the prosperity of the

country, and in and through which we have heretofore rested safely, as a nation, on what appeared to be the Ararat of constitutional liberty.

And more especially do I look with dread to the future, when we have entered upon such a revolution, not with the honest confession that it is revolution we are seeking, that we are exercising powers aside from and beyond the Constitution, and endeavoring to change the powers of the government by a resort to measures which the Constitution does not authorize; but instead thereof are attempting to give the cloak of constitutional authority to the adoption of such measures, by most unwarrantable constructions of the fundamental law, — constructions which pervert its meaning, and render it no longer a safeguard against despotic power.

My purpose at this time is to show, that in the efforts to destroy slavery, except by the actual operations of the war severing the relation of master and slave, or by an amendment of the Constitution, we are not only in the midst of a revolution, but that it is one which, if successful, subverts in effect the guarantees of the Constitution, and gives the death-blow to constitutional liberty.

For the assertion that we are in the midst of a revolution, I have an authority which you will doubtless recognize as sound and sufficient.

The Bussey Professor, in the closing lecture of the last term, upon the "Duty of the Profession to the Times," said: —

"It is idle to suppose that if the loyal States succeed, as they are confident of doing, in putting down this rebellion, that the affairs of state are to settle down into order, and resume their accustomed course and current, of their own accord. Whoever expects this forgets the strain and violence which every part of the government has received in a war of such unprecedented character and magnitude. New compromises, new limitations, new restraints, and in many things a new policy, are to be devised; and the process of reconstruction and restoration of government to its proper functions again, is to be effected gradually, and by conforming to the altered condition of things." — "That this can be, nay more that it will be, done, we have every reason in the history of the past to hope and believe. To accomplish it may require great and marked changes in public sentiment and feeling," &c. — *Law Reporter*, July, 1864. pp. 481-2.

And again he said : —

“ Now what is wanting to prepare the country to adopt and sustain the requisite changes in the details of governmental policy, is that there should be a pervading sentiment in favor of whatever this may be. I do not propose, even if I had the time to do so, to examine and inquire what those changes should be ; I assume that some changes must be made, and my only object is to see how this may be peacefully done.” p. 482.

Now it is very apparent, that my learned colleague, in the use of this language, did not mean merely a reorganization of the States where the people have attempted to secede, by some measures to produce the election of officers under their old constitutions, and with their former State rights. If that were all, upon the suppression of the rebellion some measure is to be resorted to, which will give the semblance of legality to the assembling of the people, for that purpose, in their primary meeting. Whatever measure is adopted will not be warranted by any existing statute. It is *casus omissus*, and must be provided for accordingly, perchance by a proclamation of a military governor for the time being. The only difficulty would be in the first step. That once taken, all the subsequent processes would be directed and controlled by the State statutes, made before the rebellion, for the regulation of elections.

Such a course of procedure is *Reorganization*, and could in no sense be denominated *Reconstruction*, and would require neither new compromises, new limitations, new restraints, or changes of any kind, except some changes from life to death, and perhaps from affluence to poverty, through the punishment of the principal traitors.

But my colleague was even more explicit on this point as he proceeded. He said : —

“ You are ready now, I presume, to understand what I ought perhaps to have said with less circumlocution, when I say that I look to our own profession, in this country, more than to any other class of men, to take the lead in the great moral and political revolution through which the nation is to pass before it settles down into quietness and peace.”

He subsequently says : —

“ What I want to impress upon you, as you go out from here to

enter upon your several spheres of usefulness and duty, is, that you owe it to your country, to posterity, and the world, that you qualify yourselves to think, and judge, and discriminate, and that you give to others the results of your own honest sentiments and convictions."

I join most heartily in this attempt to impress upon the members of the School the full sense of the duty which they thus owe to their country, and the responsibility attaching to the due performance of it. And I urge you, most emphatically, not to form your opinions respecting constitutional rights and constitutional duties, upon partisan newspaper paragraphs, stump speeches, flippant discussions in periodicals of higher pretensions, dignified assertions of opinion by those who assume a knowledge of all constitutional law without any study of it, heated Congressional debates, or even *sophistical* arguments by ambitious politicians who are members of the profession. But I appeal to you to seek your knowledge at the fountain-head, by an exhaustive study of the Constitution itself, and of its history, with that of the State constitutions, and to form your own opinions, upon what you shall find to be true upon such research.

In many instances the true construction of the Constitution can only be learned from a study of its history.

And for the purpose of aiding you, if I may, in this research, and of thus performing, so far as in me lies, my duty in the premises, I propose not to rest upon authority, ample as it is, to show the revolutionary nature and character of the recent attempts to press the Constitution into a service for which it was never framed, and which it cannot perform; by calling your attention to some of the arguments which have been made to prove a constitutional power in the United States to abolish slavery, and the tendency of those arguments to the subversion of the guaranties of liberty contained in the Constitution; and then to the answer to them, which answer seems to me to be complete and unanswerable.

It seems to have been generally conceded, that the United States have no power to abolish slavery in the States in time of peace. But if the provisions of the Constitution, upon which it is contended that the power exists in time of war, may be invoked to sustain that position, others may be construed, with equal facility, to confer the power at any and at all times. And

if those arguments are sound, then upon the same kind of reasoning, almost anything else may be done, by the United States, which the party in power for the time being shall deem best calculated to perpetuate its ascendancy. If this perversion of the provisions of the Constitution involved only the existence of slavery we might be disposed to acquiesce, even if we could not concur. But it strikes much deeper than that.

Before I proceed to the consideration of some of the principal arguments to which I have alluded, permit me to call your attention to a few historical facts which must form the basis of all sound reasoning respecting the powers of the States, and of the United States, and their relations to each other.

The thirteen colonies of Great Britain, lying along the shores of the Atlantic, and which achieved their independence in 1776, were, in their colonial origin, separate and distinct. Instances occurred where two were under the same Governor, but their legislative assemblies and their judiciary were entirely independent of each other, and so continued at the time of the Revolution.<sup>1</sup>

There were articles of confederation between the colonies of Massachusetts, Plymouth, Connecticut, and New Haven, in 1643, "for mutual help and strength in all future concerns," "by the name of the United Colonies of New England."

The articles declared that the United Colonies, for themselves and their posterity, entered into a firm and perpetual league of friendship and amity, of offence and defence," &c.

But the same articles expressly reserved to each colony an entire and distinct jurisdiction.

Commissioners were to meet annually, each colony sending two, who were always to be church members, and who were vested with plenary powers for making war and peace, and laws and rules of a civil nature and of general concern. Especially to regulate the conduct of the inhabitants towards the Indians, and towards fugitives, and to provide for the general defence of the country, and for the encouragement and support of religion.

The articles made provision —

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<sup>1</sup> The connection of New Hampshire with Massachusetts from 1640 to 1680 forms an unimportant exception.

"that all servants running from their masters, and all criminals flying from justice, from one colony to another, should, upon demand and proper evidence of their character as fugitives, be returned to their masters, and to the colonies whence they had made their escape, that in all cases law and justice might have their course."

Here we have the first fugitive slave-law, the first "covenant with death and hell," (twenty-three years after the settlement of Plymouth,) a New England fugitive slave-law, a Puritan fugitive slave-law.

With a gingerly care in the use of terms, which was substantially followed afterwards by the framers of the Constitution, the fugitives to be delivered up were denominated "servants." But a servant who, escaping from his master into another jurisdiction, is there liable to be seized, delivered up to his master, and returned to the jurisdiction from which he has escaped, is a slave, whatever he may be called, and whether he be black or white or copper-colored.

Trumbull (1 Hist. of Conn., 92) informs us that, in 1687, the Pequot women and children who had been captivated were divided among the troops. Some were carried to Connecticut, and others to Massachusetts. The people of Massachusetts sent a number of the women and boys to the West Indies, and sold them for slaves.

We do not need to be specially informed that those who were retained were slaves also under the name of servants.<sup>1</sup>

There was a union of all the colonies, proposed at a meeting of some of them, in conference with the Six Nations, to concert measures of defence, in 1753, and articles of union were drawn up. But that union never took place. The British government discountenanced it, fearful that, in the union of the colonies, there might be a strength prejudicial to the home government; and some of the colonies were jealous of the influence that might be possessed by the crown in such a union.

When, subsequently, the controversy with the crown approached its crisis, a unity of interest, in the great questions pending, led to mutual consultation, and a mutual determination to support each other, and particularly to sustain those colonies against which the measures of the crown pressed with the greatest severity. And when the Revolution commenced,

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<sup>1</sup> See Appendix, Note A.

the several colonies, acting separately, sent delegates to a general congress of the colonies, in which congress each colony had one vote.

The first Congress, of 1774, adopted a Declaration of Rights, in which they asserted, among other things, that the *respective colonies* were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

All the union which existed was entirely voluntary, for mutual action in reference to the common danger, and in support of principles in which each had a common interest. The colonial organizations remained entirely distinct, and thus they passed into distinct States, upon the declaration of independence.

The Declaration is one in which all the colonies united, through their delegates, and the recital of grievances is made as if they were those common to a united people.

But in the Declaration, with which the document closes, while it appears to be that of the "Representatives of the United States, in general Congress assembled," made "in the name and by the authority of the good people of these colonies;" it is solemnly published and declared, "that these united colonies are, and of right ought to be, *free and independent States*," — "that as free and independent States they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do."<sup>1</sup>

Here is a distinct assertion, not that the united colonies were a free and independent nation or republic, but that they were *independent States*.

Virginia had shortly, prior to that time, adopted her State

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<sup>1</sup> It was precisely because each of these States had the right to establish commerce, and that the Congress of the confederation had not that right, that there was a necessity for a Constitution which should take away that portion of sovereign power, and confer it upon the Congress of the United States, under the Constitution. It was equally true that the other sovereign powers, thus mentioned in the Declaration, belonged to the new States separately; although there was not the same occasion or temptation for their separate use of them.



constitution, wholly independent of any action of Congress, though doubtless in anticipation of it.

In fact as we have seen, Congress was but an assemblage of delegates, appointed by the separate voluntary action of each Colony or State, and there was nothing except the common bond of mutual interest which held them together.

"The fundamental principle of the Revolution," says Mr. Madison, "was that the colonies were coördinate members with each other, and with Great Britain, of an empire, united by a common executive sovereign, but not united by any common legislative sovereign. The legislative power was maintained to be as complete in each American Parliament as in the British Parliament. And the royal prerogative was in force in each colony, by virtue of its acknowledging the king for its executive magistrate, as it was in Great Britain, by virtue of a like acknowledgment there. A denial of these principles by Great Britain and the assertion of them by America, produced the Revolution."

Of course the declaration that they were absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain was totally dissolved, left them their separate legislative power complete, as before, and they thus became, according to their Declaration, free and independent States. The executive authority, common to all, was cast off, but no other common executive authority was established, or contemplated. Each State had the right to establish, and did establish, a separate executive authority for itself.

It is not perhaps generally known, that this Declaration was authorized, or ratified, by each colony acting separately. Eleven of the colonies, in some form, empowered their delegates to make a Declaration of Independence. South Carolina gave a general power to act on the subject, February 16, 1776. Maryland voted in favor of it June 28. Others in the intermediate time.

But what is perhaps quite as conclusive, to show that it was the several act of the colonies, although they united in the Declaration, was, that New York and Delaware, which had not given a previous authority, concurred in the Declaration after it was made.

is perhaps still less familiar to us, that in most, if not all, colonies, which authorized it to be done, it was made an essential condition, in the act by which the power was conferred, which contemplated at the same time a confederation of new States, that *the colony or new State should retain the sole and exclusive right of forming its own government, and of settling its internal concerns and police.*

may not be amiss to cite the particular phraseology of some of these resolutions.

South Carolina, April 12, 1776, "Resolved, that the delegates for South Carolina in the Continental Congress be empowered to concur with the delegates of other colonies in declaring independency, and forming alliances, reserving to this colony the sole and exclusive right of forming a constitution and laws for this colony, and of appointing delegates from time to time (under the direction of a general representation thereof), to meet the delegates of the other colonies, for such purposes as shall be hereafter pointed out."

Virginia, on the 15th of May, "Resolved unanimously, that the delegates appointed to represent this colony in General Congress be directed to propose to that respectable body to declare the united colonies free and independent States; absolved from all allegiance to the king and dependence upon, the crown or parliament of Great Britain; and that they give the assent of this colony to such declaration, and to whatever measures may be thought proper and necessary by the Congress for forming alliances, and a confederation of the colonies, at the time and in the manner as to them shall seem best: Provided the power of forming government for, and the regulations of the internal concerns of the colony, be left to the respective colony legislatures."

General Assembly of New Hampshire June 15th, unanimously directed their delegates "to join with the other colonies in declaring the thirteen united colonies a free and independent State" . . . "providing the regulation of our internal police be under the direction of the general assembly."

"deputies of the people of Pennsylvania, assembled in full provincial conference," June 24th, unanimously declared their "will to concur in a vote of the Congress, declaring the united colonies free and independent States, provided the forming the government and the regulation of the internal police of this colony be reserved to the people of the said colony."

Connecticut Assembly, June 14th, "Resolved, unanimously, that delegates of this assembly in general Congress be, and they are

hereby, instructed to propose to that respectable body to declare the united American colonies free and independent States. . . . And also that they move and promote, as fast as may be convenient, a regular and permanent plan of union and confederation of the colonies for the security and just preservation of their just rights and liberties, and for mutual defence and security, saving that the administration of government and the power of forming governments for, and the regulation of the internal concerns and police of each colony, ought to be left and remain to the respective colonial legislatures, and also that such plan of confederation be laid before such respective legislatures for their previous consideration and assent.”<sup>1</sup>

These extracts from the proceedings in the several colonies are sufficient for the purpose of showing the authority which was given to make the Declaration of Independence, and the restrictions and limitations under which it was made. They serve to show that the language of the Declaration, declaring the colonies free and independent States, was a well-considered exposition of the purpose and effect of the act. New Hampshire, it seems, had authorized her delegates to join in a declaration that the thirteen united colonies were a free and independent State;<sup>2</sup> but the language of the authority given by Virginia to declare them free and independent States, was that adopted by Congress. The language of the resolve of the Connecticut assembly shows that the contemplated confederation of the colonies was to be for the security and preservation of their just rights and liberties, and for mutual defence and security, and not for the formation of a national government. And they all show with what care the several colonies reserved to themselves the right of forming their own governments, and regulating their internal affairs.

This determination to retain the right to regulate their own internal affairs will be found in all their subsequent history.

That the power so retained and reserved, extended to the regulations of foreign commerce, appears not only from the fact that the exercise of that very power by the several States, was

<sup>1</sup> For these extracts from the proceedings of the several colonies, I am indebted to the kindness of Hon. Richard Frothingham, of Charlestown. See an article by him in the *Boston Post*, March 2d, 1854.

<sup>2</sup> It is possible that there may have been an error in copying the resolve of this colony, and that the language was similar to that of the other colonies in this respect.

one of the principal causes which led to the formation of the Constitution, but from the fact, also, that North Carolina, refusing for a time to adopt the Constitution, collected duties upon her own authority, without objection; which, however, she directed to be paid into the common treasury.

The union for the purposes of the common defence, and for the promotion of the common interest, was doubtless in the contemplation of all at the time of the Declaration of Independence, but the formal Articles of confederation, adopted afterwards, show how jealously the several States guarded their State independence, and their State rights.

Some persons have been disposed to treat the Declaration of Independence,—as if what Mr. Choate aptly termed its “glittering generalities,” were Constitutional Law,—as if the assertions contained in it, “that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness”; constituted, of themselves, an abolition of slavery, or conferred some right upon the General Government to abolish it.

But to this the answer is cogent: ‘slavery existed in all the States at that time; and it never entered into the heart of man, at that day, to conceive that these assertions affected the *status* of the slave.

If we take the words of those who drew, and those who sanctioned the Declaration, we must take them with the meaning which they attached to them.

It will be difficult to maintain, as a precise enunciation of truth, applicable to all particular cases, the assertion that all men are created equal. Whether we refer to mental qualifications, or physical endowments, or political or social position, or to any other relation, it is not necessary, in order to controvert this position, in its application to the particular relations of mankind, to adopt the criticism that it is not men, but children who are created.

There are other clauses which, if they can be maintained at all, are expressive of general, rather than particular, truth.

We come next to the consideration of the Articles of Confederation, adopted in Congress, November 15th, 1777, but which were not ratified by all the States until 1781.

The first article is, "The style of this Confederacy shall be the United States of America." The second is, "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled."<sup>1</sup>

By the third article the States severally entered into a firm league of friendship with each other, for their common defence, and security of their liberties, &c.

It was in form and purpose essentially a compact. The Confederation acquired nothing by the success of the war. It achieved no independence for itself, or for Congress. It claimed none of the territory wrested from Great Britain. Not an acre of it belonged to the United States, in Congress assembled, upon the Declaration of Independence, nor to the Congress under the Confederation, on the close of the war; nor until some portion of it was ceded, afterwards, by the States in which it was situated. Some of the States which claimed large tracts of vacant land, as contained within their boundaries, made cessions, after the war, for the purpose of paying the debts contracted in the common cause, and perhaps in anticipation of the institution of a more formal government. That was the case with the cession of the territory northwest of the Ohio by Virginia, and the cession of their claims to it by other States. Other cessions followed. The States ceding made their own conditions, as fully as if they had been foreign governments.

We may see here the utter folly of the position, that a State attempting to secede, thereby becomes *felo de se*, and a territory of the United States. Suppose Massachusetts had withdrawn from the Confederation, into what condition would she have fallen territorially? This is a fair test; for none of the States ceded themselves or their territory, or conveyed to the United States any right to their territory in remainder, by the adoption of the Constitution of the United States.

We cannot fail to perceive in all these proceedings, from the confederation of the colonies in New England, in 1643, to and including the confederation of 1778-81, with what care the Colonies in the first instance, and the States afterwards, guarded

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<sup>1</sup> See Appendix, Note B.

their separate organizations ; and how jealously they stipulated for their independence and sovereign authority, in all matters which they did not expressly yield by the acts of confederation, and by their joint action.

This separate independent organization is inherent in the very existence of the Republic, and must continue to be so, if the Republic is to be maintained.

Very recently I heard a gentleman express the hope that the present controversy would soon be settled, and settled in such a manner that "we should never hear anything more of State rights."

This could only be by the extinction of State rights ; and that would result, at no very distant day, in the extinction of a republican government here. Let no one hope that a great centralized government, extending from the Bay of Fundy to the Gulf of Mexico, and from the Atlantic to the Pacific, wielding all the power, and possessing all the patronage, which must of necessity result from the destruction of State rights, could remain, for any length of time, a Republican government.

State rights have been pressed out of their proper sphere, and into antagonism with the Constitution, first by the Virginia and Kentucky resolutions of 1798 and 1799, and subsequently by the mad action of Southern conspirators ; but their preservation, in their legitimate sphere, is essentially necessary to the safety of our Republican institutions.

In the Constitution we have an instrument of a different character from the Articles of Confederation which preceded it.

It has none of the distinctive features of a league or compact. In its whole phraseology and general character, it resembles the State constitutions, which are admitted on all hands to be the fundamental laws of the several States. That it is limited, in its operation, to certain purposes, does not affect its nature or character in this respect. It has its legislative, executive, and judicial (but not despotic) departments, and its means of existence, self-sustaining, without the aid of the States, except in the election of senators, and as the people of the States send representatives to Congress. It has provisions regarding the punishment of treason, — treason against the United States, — and of course there is an allegiance due to the government which it constitutes, otherwise there could be no treason. And

that might well settle its character. Treason against a compact, where there was no allegiance, was never yet heard of.

No body of men, whether in an organization called a State, or otherwise, can at their pleasure secede from their allegiance, except by revolution, or by a removal without the jurisdiction of the government to which the allegiance is due. But I am not to discuss that now.

This instrument barely escaped rejection. Supported as it was by the weight of character of those who formed and recommended it, by many of the ablest pens in the country, and especially by the most able writers of the *Federalist*, it was adopted by very small majorities, in several of the conventions; and its rejection in them would have caused its rejection in others.

Some of the principal objections were that it contained no Bill or Declaration of Rights, such as were found in some of the State constitutions; and that it might therefore be made subversive of the liberties of the people; that there was in it no recognition of the rights of the States; and that it limited, or might be construed to limit, to too great an extent, the powers possessed by the States.

The nature of the objections may be seen in the amendments which were proposed to it, by the conventions, several of which were adopted immediately after the Constitution went into operation. Without an assurance that some of these amendments, deemed most essential, would be adopted, its rejection would have been certain. The great question was whether it should be adopted in the faith that it would be amended in these particulars, or whether it should be rejected, and a new one formed, more satisfactory; and the rejection it was feared would seriously endanger the attempt to form such a government.

Prominent among these amendments you find provisions for the security of freedom of speech, and of the press; asserting the right of the people to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures; against the issue of warrants, but upon probable cause, supported by oath or affirmation; and that no person should be deprived of life, liberty, or property, but by due process of law. Also an article that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Several of the States formed their constitutions during the war. In the Bill of Rights, prefixed to that of Virginia a few days before the Declaration of Independence, there is a declaration against the suspending of laws by any authority, without the consent of the representatives. Another, that general warrants to seize any persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted. Another, that the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

The Declaration of Rights adopted by North Carolina, and made part of her constitution in December of the same year, has similar declarations respecting the suspension of laws and the freedom of the press, and some provisions still more explicit in relation to personal liberty.

The constitution of Massachusetts, adopted in 1780, declares that each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to the standing laws; that no person shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally, described to him; that no person shall be arrested, imprisoned, or despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or by the law of the land; that every person has a right to be secure from all unreasonable searches or seizures of his person, his house, his papers, and all his possessions; that the liberty of the press is essential to security of freedom in a State; that the military power shall always be held in exact subordination to the civil authority, and be governed by it.

These constitutions were made in time of war, and went into immediate operation. They were of course intended for a time of war. It is in war that the security of such provisions is most important to the safety of the citizen.

Provisions substantially similar, found in the amendments to the Constitution of the United States, have there, it must be concluded, a significance and operation, so far as the United States are concerned, like the provisions in the State constitutions from which they were derived.



One of the arguments in favor of the constitutional power to disregard the limitations of the Constitution, is expressed in the assertion, that there must of necessity be a constitutional power in the government sufficient for its own preservation, and that it may do whatever is necessary for that object. The position is, logically, untenable. There is no such controlling necessity. A government may be so constituted that it has not sufficient power for that purpose. The Confederation, under the Articles, was a government with powers and duties, and possessed a governmental character. But it was without the necessary powers for its own preservation if it had been assailed. It was dependent upon the will of the States in many particulars.

I am not one of those, however, who admit, even for a moment, that the Government of the United States has not sufficient constitutional power for that purpose. I maintain, strenuously, that it has ample power, in the ordinary exercise of its functions, without the invocation of arbitrary or despotic power for the purpose.

Another argument introduces, in express terms, a despotic power into the Constitution.

The constitutional powers have usually been divided into the legislative, executive, and judicial, and those powers are, in some shape, inherent in a complete government.

But we have a new expositor of constitutional law, with a different division of the powers of a Republican government.

A general officer whose law and whose laurels seem to be alike deficient, in a recent speech in a neighboring city, argued "that our Government combined several elements of power,—the judicial, democratic, and despotic."

Here are two new constitutional powers. No doubt there is a democratic element in a republican government, but one would suppose that a democratic power, and a despotic power, in a republican government, must be antagonistic, and that there could be no peace until one had subjugated the other.

I confess that I am at a loss to understand what is meant by a democratic power, in such a connection, unless it is intended to assert that anything may be done under the Constitution, which is supposed, for the time being, to represent the popular will.

A despotic power is much more intelligible. But I think it

is one of the modern discoveries in the science of government, which places it by the side of the judicial in the republican government which exists under our Constitution.

That I may not be supposed to have made a mistake, I quote from a report of the speech in a newspaper friendly to the speaker, in which it is said:—

“He then replied to the assertion that the President was despotic, and argued that our government combined several elements of power,—the judicial, democratic, and despotic. The perfection of our government, and where it materially differs from other governments, is, that it has all these elements of power, and presents at one time one feature, and at another time another feature. You know perfectly well,” said the General, “that in the constitution and character of an individual, to make a perfect man, he should possess both good qualities and bad qualities. Not that the good shall be exercised for a bad purpose, but that they shall be so moulded and governed as to allow him to act with great power. Without these qualities he may have good intentions and no power; with too much bad quality, he may have great power and no good intention. It is the balancing of these qualities that makes a perfect and good man. Our government, under the wisdom of our fathers, was shaped exactly upon the model of a great and good man. They have invested our government with all the qualities that exist in other governments, so that from whatever point it may be assailed, it will have the requisite means and power to meet the emergencies of the crisis.<sup>1</sup>”

Is it intended to be asserted that under our Constitution, at one time, the feature of the judicial element may be presented, and a case allowed to take its regular course in the judicial tribunals; that at another time the democratic feature may be presented, and the administration determine according to what it believes to be the popular sentiment of the day, without regard to the judicial power; and at another, the administration may put its despotic face upon the matter and take its own course, irrespective of the judiciary or public opinion, and without responsibility? If it does not mean this, the question is, what does it mean?

This speech is significant, as it comes clothed with a semblance of authority.

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<sup>1</sup> Report of the Speech of General Banks in *Faneuil Hall*!!!—*Boston Daily Advertiser*.

The despotic element of power is intelligible enough, but to what conclusions will it lead us ?

"In the constitution and character of an individual," said the speaker, by way of illustration, "in order to make a perfect man, he should possess both good qualities and bad qualities." . . . . "It is the balancing of these qualities," he adds, "that makes a perfect and a good man. Our government, under the wisdom of our fathers, was shaped exactly upon the model of a great and good man."

Now, as we are not told how much of the devil a man must have in his composition in order to be "a perfect and a good man," we are left in doubt how much of the despotic element of power it takes to make up a good and perfect republican government.

But in the report we are favored with a little insight into the practical application of this despotic power, and have also information how this new doctrine was received by his auditory. The speaker said : —

"We are surrounded by the public enemy ; he is here in the city of Boston, and in New York, as well as in the twelve or fourteen insurrectionary States. [Applause.] What power is required, under the Constitution of the United States, to meet this enemy here and elsewhere ? [Applause.] It is the despotic power, [cries of Good,] that the enemy in arms should be destroyed, and the enemy in our midst shall be deprived of all power to circumvent or betray the country or its people. [Tremendous cheering.]"

The speaker then proceeded to justify arrests under this despotic power, — arrest without warrant, of course, — arrest at the pleasure of persons in power ; which, on the order of some official, consigns the victim to the dungeon, without access of friends, without knowledge of what he is accused, without an opportunity to be heard, with no trial, and no means of liberation.

He says of this theory of arrest : —

"It is purely American, taking its character from the *good* and *generous* heart of the American people. It had its origin in the Constitution. It is a power of arrest that deprives men of the liberty or the privilege to do public harm. That is all."

Yes, that is all, except that the questions who shall be selected

as the victim who is to be restrained from the liberty to do public harm, and how long he shall be restrained, are at the despotic will and pleasure of an irresponsible individual, quite as likely to be exerted to gratify some private grudge as for the promotion of the public good.

The speaker was right when he said that this theory of arrest is not even English, for in Great Britain no such constitutional right, to make arbitrary arrests without responsibility, is admitted even for a moment. The ministers who order an arrest are responsible to parliament, to show sufficient reasons for it, and are exposed to prosecution for it, unless they obtain an act of indemnity.<sup>1</sup>

One of the earliest of the attempts to sustain this theory of despotic power, was that contained in a pamphlet entitled "The War Powers of Congress and the President," which was so satisfactory to the "powers that be," that the author was immediately translated to the War Office.

In this pamphlet he attempted to maintain that the powers granted to Congress, in the 18th clause of article 1st, section 8th of the Constitution, [powers to make all laws which shall be necessary and proper to be exercised to carry into effect the powers vested by the Constitution in the government and officers of the United States,] were, in one sense, unlimited and discretionary; that they were more than imperial; that it was intended by the framers of the Constitution, or by the people who adopted it, that "the powers to provide for the general welfare and common defence should be unlimited"; "that the law of nations is above the Constitution"; and that the amendments to the Constitution, which declare that no man shall be deprived of life, liberty, and property without due process of law; that unreasonable searches and seizures shall not be made; freedom

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<sup>1</sup> Mr. Webster in his magnificent speech, the second in reply to General Hayne, said of American Liberty: "It will stand, in the end, by the side of that cradle in which its infancy was rocked; it will stretch forth its arm, with whatever of vigor it may still retain, over the friends who gather round it; and it will fall at last, if fall it must, amidst the proudest monuments of its own glory, and on the very spot of its origin."

That "fall" would at least seem to have been impending when General Banks, in Faneuil Hall, amid "tremendous cheering," advocated despotic power as one of the elements of constitutional authority, and arbitrary arrests as a legitimate exercise of power under the Constitution.

of speech and of the press shall not be abridged ; and that the right of the people to bear arms shall not be infringed ; — are not applicable to a state of war.

He must have no very sound appreciation of the nature of our Constitution, or no very high opinion of the intelligence of his readers, who attempts to maintain that the law of nations is above the Constitution in its application to the internal affairs of the United States, — whether those affairs relate to a time of civil war, or to one of profound peace.

And he must have something more than a reasonable degree of modest assurance, who with the history before him to which I have already referred, asserts that the provisions contained in the amendments to the Constitution for the security of personal liberty were not made for time of war.

With the addition of the allegation, substantially, that the President may do anything which the military necessity requires, and that he is the sole judge when the military necessity arises, and what it requires, the most strenuous advocate of despotic power would desire nothing further in time of war, — nor, if the power to provide for the general welfare and common defence is unlimited, and discretionary, and more than imperial, as alleged in this pamphlet, could despotism need any power beyond it, in time of peace.

If the liberties of the people are not utterly destroyed, upon such doctrines, it will be because the ambition of the incumbent of the presidential chair does not lead him to desire to subvert those liberties, and I give him credit that he does not desire it. But the ultra politicians of this despotic school cast their liberties, and those of the rest of the people, at his feet, if he will but choose to trample on them.

Having examined these positions somewhat at large upon another occasion,<sup>1</sup> I propose now merely to refer you to the brief history of the Government, as I have sketched it, for their complete and emphatic refutation.

This remarkable pamphlet has, however, been lauded by great and little periodicals, received the commendation of reverend doctors of divinity as an exhaustive treatise on the constitutional powers of the President and Congress, been mul-

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<sup>1</sup> 1 "War Powers of Congress and of the President." "An Address before the National Club of Salem," March 13, 1863.

tiplied in its editions, circulated by societies, and has arrived at last to the dignity of stereotype plates and pasteboard covers.

Even the fine arts have been invoked, not merely to sustain the Proclamation of Emancipation, but to give immortality to this sophistical argument in favor of despotism, under the guise of constitutional law, — a subject which its author did not understand.

Very recently, I have seen on exhibition a picture entitled, "President Lincoln's Emancipation Proclamation before the Cabinet." It is intended to represent the President and Cabinet in consultation upon the subject, and the proclamation lies upon the table. Prostrate upon the floor is the Constitution of the United States; and near by, leaning against the leg of a chair, as if somewhat exhausted by the conflict in which it had achieved a victory over its prostrate victim, is Whiting's "War Powers of the President," swelled in its proportions to a thick octavo volume, either in sheep or in calf; which, does not distinctly appear, but the presumption is in favor of the latter.

It has been our boast that our liberties are defined and secured by written constitutions, unchangeable but by the will of the people expressed in some mode prescribed by them in those constitutions, and that they are therefore not held at the pleasure of the executive, or even of the legislative department. But if this sophistical text-book of ultraism is to be sustained by factitious efforts to give it currency and character, and Generals expounding the Constitution are, with "tremendous applause," to assert that it contains the element of despotic power, — "all the qualities that exist in other Governments," Russia and Turkey of course included, — God save the people from the despotism which is impending over us.

Another of the revolutionary theories, attempted to be justified under the Constitution, is that promulgated in certain resolutions introduced into the Senate of the United States by Mr. Sumner in 1862, the first of which is —

"That any vote of secession or other act by which a State may undertake to put an end to the supremacy of the Constitution within its territory, is inoperative and void against the Constitution; and when sustained by force, it becomes a practical *abdication* by the State of all rights under the Constitution, while the treason which it involves still

further works an instant *forfeiture* of all those functions and powers essential to the continued existence of the State as a body politic, so that, from that time forward, the territory falls under the exclusive jurisdiction of Congress, as other territory; and the State, being, according to the language of the law, *felo de se*, ceases to exist."

The conclusion in another resolution was, that, —

"the termination of a State, under the Constitution, necessarily causes the termination of those peculiar local institutions which, having no origin in the Constitution, or in those natural rights that exist independent of the Constitution, are upheld by the sole and exclusive authority of the State."

These resolutions have the negative merit of not maintaining doctrines which are in subversion of the liberties of the citizens of the free States, and the positive demerit of being at variance with the history of the formation of the States, and of the United States.

As I have discussed them briefly heretofore,<sup>1</sup> it might be sufficient at this time to refer you to the history which I have sketched of the organization of the several States, and the adoption of the Constitution of the United States. But a few incidental remarks may well find a place here.

It is important to discriminate between the action of the States, and of the individuals inhabiting those States.

It is said that South Carolina has seceded; that the State has seceded. This is very well, so long as we use the phraseology to express, briefly, the idea that a convention, elected by a major vote of people in the several voting precincts of that State, has adopted what is called "an ordinance of secession."

If it was within the scope of the power of the people of that State, under the Constitution and Government of the United States, to elect persons to meet in convention, and pass such an ordinance, as the act of the people of South Carolina, then it is true, in a legal sense, that South Carolina has seceded, because if that be so, the ordinance is the act of the State, — of the political organization and existence called South Carolina. But in such case it will be the lawful act of South Carolina, and the ordinance becomes a valid act of secession.

For on the other hand if the people of South Carolina had no

<sup>1</sup> "Constitutional Law." — *North American Review*, April 1862.

lawful constitutional right to elect members of a convention for such a purpose, and to confer upon them power to pass such an ordinance, then the members not being legally elected by the authority of the State for that purpose, the convention did not represent the State, the members represented only those who chose them, — a certain portion of the people of South Carolina, greater or less, who could not confer such a political power, — and in that view there is no act of the State; no ordinance by the State, and no secession of the State. The political existence legally known as the State of South Carolina is still, in legal contemplation, in the Union, disorganized to be sure by the act of her people who attempt to maintain this ordinance of secession; but the State is not in fault, for the reason that the offence is not committed by the State. The people who concur in the act are rebels against the Government of the United States, and punishable as such, none the less because they have usurped also the authority of the State.

The Constitution and the laws of the United States, especially the provisions in relation to treason, all support this view of the case. No provision is made for the punishment of the offence of a State. The offence is by the individual, and the punishment is upon him. If this were otherwise, and the act were that of the State, the offence would be that of the State, and the State ought to be punished for treason.

It is a recognized rule of international law that the individual is not responsible for an act of hostility which he does by the command of his government; and the better opinion seems to be that even a ratification of the act by the Government, is equivalent to a prior command, exonerating the individual, and substituting the responsibility of the Government. The steamer *Caroline* was burnt at Niagara Falls, by a party from Canada, sent by order of Colonel McNab, and one or more persons were killed. The British Government avowed the act. The authorities of New York afterwards insisted upon trying McLeod, who boasted that he was one of the party, for murder, but the administration of that day — Mr. Webster being Secretary of State — denied the right of the State to take jurisdiction of the act as one of murder, upon the ground that Great Britain having avowed the act, she alone was responsible, and that the matter was, from that time forth, one between the United States and Great Britain.



On the same principle, if South Carolina is regarded as a State which may hold a State convention and pass an act of secession, which thereby becomes the act of the State, so that the military array within her borders is the act of the State, then although the act is wrongful, that does not make it any less the act of the State; and the individuals concerned in the act itself, and more especially in all subsequent acts of force following it, should be held exempted from any liabilities except such as result from war, and the State be held to her just responsibility. That would constitute a case for war between the United States and the State of South Carolina were there not insuperable objections to such a warfare, arising from the very Constitution of the Government of the United States. To what responsibility can the United States hold the State of South Carolina, as a State, in such case? — not to indictment, trial, and confiscation. It must be the responsibility of war, waged by and against a foreign power, and the result then might be conquest.

It is not perhaps material to the question raised by the Senatorial resolutions referred to, whether the acts of pretended secession and actual war are regarded as the acts of the State, or of the persons who adopt and commit them; for if the State itself is supposed to have done the act, and it be one of wrong and rebellion, the State organization still exists, — exists as a State, and of course the State being a living political existence, there is no State suicide, and no lapse into a territorial condition. The State, instead of being dead, is in active hostility.

But again, if we assume, for the sake of the argument, that this illegal and wrongful attempt to resume its original position as a State, as it existed on the Declaration of Independence, has been, somehow, the destruction of the State, (which in defiance of such an idea retains all the organization of a living acting State,) if we strike out, in imagination, all the semblance of authority in a State because it has forfeited its rights as a State, and we thus find a tract of land inhabited by people, — call it a territory if you please, — that territory which thus presents itself is either an unorganized territory, the people of which have a right to begin *de novo*, or it is a territorial dependence, not of the United States, but it would seem of Great Britain herself; it might be of the old Confederation if that

was in existence. By the treaty of peace, Great Britain ceded her claim to the territory between the Atlantic and the Mississippi. But who was the other party to the cession. Not the United States of America, at present existing under the Constitution, for no such Government or nation then existed. It was to the United States of America, consisting of several States, represented by such authority as existed under the Confederation; that is, a cession of her claims to the several States themselves. The States did not cede themselves to the United States by the adoption of the Constitution. If, then, South Carolina should lapse into an unorganized territorial condition, as that territory has never been ceded to the United States, how is the Government of the United States to make title to it, as a territorial dependency. Perhaps a better title might exist to the territory comprised in the State of Mississippi, if that State should cease to exist as a State.

It may be said that this is a technical legal argument. But no other argument can avail to determine the legal *status* of the States. The theory of State suicide assumes to be a technical legal argument also. The difference between the two is, that the argument above presented leads us to logical results, and the State suicide theory to an entire confusion of legal principles and consequences.

There is another argument, which produces the death of the States attempting to secede, not by State suicide, but by conquest; by force of the arms of the United States, on the successful termination of the war, in the same manner that a conquest may be made of foreign territory.

The number of the "Law Reporter" for August 1864, contains an elaborate article entitled, "The Legal *Status* of the Rebel States before and after their Conquest," attempting to maintain that a civil war exists in the United States, which gives to the parties to it all the rights which exist in the case of a foreign war; that one of these is a right of conquest, that the United States may therefore conquer the seceding States, and treat the territory embraced in them as a conquered country.

It may be true, that after a rebellion, which has assumed such proportions as to be aptly denominated a *civil war*, and after the rebels have been recognized by other nations as belligerents, the parties to that war have, *so far as other nations are concerned*, the same rights against each other as if the war was a

foreign war. As to them, after such acknowledgment of belligerency, it is so. They assume that each party has an equal right to prosecute the war; they profess to stand neutral between the two, as equals, and of course do not regard the rebels as traitors, or their privateers as pirates; they admit the vessels of each into their ports; they treat the territory occupied by the rebels as if it was the territory of the rebels, and claim to enter the ports there as if those ports really belonged to the rebels who are in possession of them.

As to such other nations, therefore, it may be said, that the suppression of the rebellion, and the occupation of the territory by the government assailed, would be conquest, for such suppression and occupation would carry with them all the rights of conquest, *so far as such other nations were concerned*. They would be obliged to respect the change, and treat the ports and territory as having passed into the possession and government of the prevailing party. The case would be the same if the rebels, in the course of the war, should conquer and wrest from the nation assailed, a part of the territory which, in the beginning of the war, was in its undisputed possession.

All this from the operation of the law of nations; and we see, therefore, why, in the discussions found in treatises upon the law of nations, respecting the nature and character of a civil war, and in regard to the relation of other nations to such war, (for in no other relation is the law of nations applicable to such war,) it may well be said, that each party to a civil war has the same rights as if the war was a foreign war. It is a foreign war as to those affected by it in such relations.

But all this has nothing to do with the rebellion, and to a civil war arising out of it, as *between the parties to it in their domestic relations*, if that term may be admissible to describe the relations of the parties. As between the parties to that war, the rebellion, in the outset, is insurrection, — treason. As between them it never for a moment changes its legal character during its continuance, although the success of the rebels may result in revolution. It is treason throughout all its stages. It is not treason in theory only. It is treason in fact. There is no time when the acts of force on the part of the rebels become lawful war, or when they become, as this writer seems to contend, justly excusable during the continuance of the war, and punishable afterwards.

The war may become of such magnitude, and the opposing forces be so nearly equal, that victory may be suspended in the balance, and the scales may incline, first to the one side, and then to the other. And thus it may become no longer expedient for the nation assailed to treat those engaged in the conflict as traitors, because their punishment as traitors would provoke retaliation. And wholesale executions for treason, under such circumstances, might well shock the moral sense of the civilized world. But that neither gives the rebellion nor the rebels legal rights arising out of the war against the constituted government which they have assailed. It does not change the legal *status* of the portion of the country possessed by the rebels, nor in any way sever it from the government to which it belonged before the war, or change its legal relations to that government, so far as the immediate parties to the war are concerned.

If the rebels form a government, or usurp the authority of the existing government, that does not constitute a lawful government as against the government assailed, except in the event of their success.

Their organization may constitute a government *de facto*, coming into existence by usurpation, but through color of election, and the proceedings of that government, in relation to all matters not directly of a rebellious character, may be held afterwards to have validity for State purposes, as the acts of a government *de facto*.

But a government which is such *de facto* only, and not *de jure*, coming into existence merely by color, and not by right, is a wrongful government. Its proceedings, so far as they affect private rights and third persons, may perhaps be permitted to stand, for the prevention of confusion and mischief. Those who act under its orders, in all matters in which the lawful State government might have given similar orders, may be excused. It may well be held, therefore, that it is not treason against a State to obey the orders of the government *de facto* when the powers of the State are usurped.

But the orders of a *de facto* State government cannot be admitted to have an operation, by way of justification or excuse, beyond what those of the government *de jure*, if given in the same case, might lawfully have had. And no lawful State government could rightfully have ordered acts of treason against

the United States, nor in any way have furnished a justification or excuse for such acts of treason. No State could give orders to make war upon the General Government, nor to resist it in the exercise of its proper functions. Still less could any person justify or excuse acts of treason under the orders of the "Confederate States," upon the ground that the Confederacy was a government *de facto*.

How it might be where the party could show that he acted upon compulsion and was not a voluntary agent, and could not, therefore, be held to have had a criminal mind and intent, is a different question, the consideration of which is not important to this discussion, which serves to show that the governments *de facto* of the States could not do or authorize any acts which could result in a conquest of the States. Clearly the lawful State governments could not do so.

It is true also that, in relation to captures of property by the naval forces of a government assailed by a formidable insurrection, a civil war may be treated as if it were a foreign war, for the purposes of determining the right to capture, and the disposition of the property captured.

Captures are for the most part made upon the high seas, and the law of nations generally regulates the rights of capture there. The capture is necessarily made, as it would be if the war were foreign instead of civil, and the law of nations, in relation to prize, is applied for the adjudication respecting the right to capture and the disposition of the prize. In a civil war there may be blockades and captures for carrying contraband goods.

But all this has no relation whatever to the nature and character of the contest generally, as it is prosecuted between the parties, within the territory of the government assailed, where the character of the contest is not changed from that of insurrection and rebellion by such blockades and captures.

Let us not be deceived by the misuse or confusion of words. If all the text-writers on International law should assert that a nation may make a conquest of a part of its own territory, — of a part of itself, — in the suppression of a rebellion, because the conflict which ensued upon rebellion was a civil war, and a civil war gives the same rights as a foreign war, as between the parties to it, they would only stultify themselves. They make no such assertion. That is the illogical conclusion of those who are seeking to accomplish a purpose.

The attempt to apply the law of prize, so as to give a right of conquest, and the effects of conquest as a result of that law, is as absurd as it would be to apply the law of trover to the offence of treason.

The idea that because the rebels organize a government of their own (not in place of, nor obtaining possession of the government assailed), they can excuse their acts of treason, if done in compliance with the orders of their government *de facto*, because the contest has become a civil war, is worthy of a place alongside of the idea that a nation may make a conquest of a part of itself.

The relations which I have shown to exist between the United States and the several States; and between the people of the United States, as an entire but limited government, and the people of each State; preclude the idea of the rebellion of a State, as such, because the State, as such, is incorporated into, and forms part of the greater territorial government constituting, the United States. The State, it is true, is an entire entity—a distinct political existence—for certain purposes and objects, for all lawful purposes and objects, having all political powers except those embraced within, and held by, the government of the United States. But rebellion is not one of the purposes and objects, nor one of the political powers, of a State in the Union. If it seek secession it is an attempt to tear the State from its position as a part of the great whole, which it is unlawful for a State to do, and there can therefore be no action recognized as State action for such a purpose.

So the powers granted to the United States bind the State with bands “stronger than hooks of steel” to its place as part of the United States. It is within a State that the United States are authorized to issue and serve process, hold courts, enforce judgments, levy taxes, and collect revenue.

It is there also that the United States have duties to perform,—the duty to repel invasions, to suppress insurrections, to guarantee a republican form of government, to provide for the necessities and convenience of commerce.

These rights and duties are still in full force, notwithstanding all the votes of secession, the usurpation of the State authority by the rebels, and the formation of a Southern Confed-

eracy, and notwithstanding the war has suspended the active exercise of them.

If it were not for its mischievous tendency, it would be the merest nonsense in the world to assert that the United States could make a conquest of a territory where it possesses such rights, and owes such duties; that the government could in that way not only dispense with its rights, and abandon its duties, but could subvert the very institutions it is bound to protect, even if a majority of the people have unlawfully, and outrageously, if you please, attempted to renounce their allegiance.

If it is conquest, then all the institutions of the State may be changed. If it is conquest, there is no longer any constitutional duty to protect the conquered portion of the country from invasion or insurrection, for the conquest may be abandoned at pleasure; and there is no longer any duty to hold courts under the Constitution, or to provide for the wants of commerce.

No one would attempt to maintain that a State could, by reason of an insurrection in one of its counties, make war upon the county itself, conquer it, and obtain by force a right to change its laws, which right it had before the insurrection; or as a victor to dispose of its entire population, whether or not participating in the insurrection, which right it had not before, and could not acquire by means of the insurrection itself. The duty which the State owed to its loyal population, to its citizens inhabiting the county, could not be cast off in that manner. Its disloyal members it could punish.

This undoubtedly is not "a case in point," for a State in the Union is not a part of the United States, in the same sense and mode that a county is part of a State. The United States cannot make all the laws of a State and govern it, as a State may do respecting a county. A State under the Constitution is, to the extent of everything, not granted directly or indirectly to the United States, or prohibited to the State, an independent community.

Still the State is part of the United States. To the extent to which the United States may make laws affecting the State, and its people as citizens of the State, and to the extent to which the United States owe duties to the State, or to the people of the State, as such, — the analogy holds good. The United States

cannot consistently with the Constitution, acquire a greater right to make laws affecting the internal affairs of the whole State, by reason of the treason of the inhabitants, however numerous the traitors. The General Government cannot by reason of such treason, divest itself of its duties to the State, or to the citizens of the State, who are at the same time citizens of the United States.

Moreover it would be inconsistent with the duties which the United States owe to the other States, to attempt to overcome and make a conquest of a State. When the Constitution was formed, and the United States guaranteed a republican form of government to each State, it assumed a duty to each and all of the States, not only to protect the existence of the several States, but to protect their existence as republican States; and when a State is assailed, the duty of protecting that State, and guaranteeing to it a republican form of government, is not due to that State alone, but to each and every one of the other States.

Furthermore, the term "*conquest*," in its application to war and its results, implies something more than reduction to submission. It is used to mean more in the discussion respecting "the legal *status* of the rebel States before and after their conquest;" for reduction to submission, to wit, the suppression of the rebellion, would not be sufficient to accomplish the purpose. It is perceived that this would give no right to the United States to abolish slavery, and therefore this stretching after something further. Conquest, in such connection, means emphatically *acquisition* by the power of force, and it gives the right to dispose of the conquered territory and people at the pleasure of the conquering nation, subject only to the requisitions of humanity and the rights of other nations, if any they may have.

It is utterly preposterous to say that the United States may, consistently with the Constitution, acquire a State which is not foreign, but which is existing in the Union, or that it can acquire the whole territory of such State. Either would cause the extinction of the State, as one of the United States, and, to that extent, a dissolution of the Union. Such acquisition, *by purchase*, would, under the present Constitution, be revolution. It could not be made consistently with the duty which the government of the United States owes to the whole



people of the United States, to all the other States, and, it may be said, to the State itself, which having duties to perform as a member of the Union, has no power to sell itself, either to a foreign government or to the United States. Still less can such acquisition be made by war and conquest, by reason of the same duties on the part of the United States, and for the additional reason that it is in violation of all those duties to make war upon a State.

No act of a majority of the people of one of the United States, however great that majority, and whether the act be one of negotiation and trade, or one of rebellion, can enable the United States to acquire the State.

Each State being part and parcel of the United States, if the latter could acquire, by conquest, a part of itself, it might conquer itself entirely, by instalments, and thus having swallowed itself, piecemeal, there would be nothing left of it. That, you will admit, would be revolution. There can be no conquest, unless we admit that the State is foreign. That admission makes secession valid, and would show that we had no right to treat as treason the lawful act by which, in that view, secession would have been actually accomplished, and would thus prove that the war which has been waged on the part of the United States was unjustifiable.

The doctrine that the United States can conquer the States, and treat them as territories, is revolutionary. If we mean to have revolution, let us at least call it revolution, and not adopt constructions of the Constitution which render it no better than waste paper, so far as the liberties of the people and the rights of the States are supposed to be secured by it.

## LECTURE II.

DELIVERED JANUARY 24, 1866.

GENTLEMEN OF THE LAW SCHOOL:

I propose to speak to you to-day of certain principles of constitutional law.

For a few years past the time has not been favorable for such discussions. For years previous to the late war, the sectional controversies which culminated in that war gave too strong an impress to the minds of the community for the favorable reception of legal truths; and during the time of the war itself, any one whose legal opinions, upon questions connected with it, did not come up to the full measure of the party standard, was very sure, if not denounced, at least to be disbelieved. Great numbers of the people were persuaded that the Constitution must justify whatever they thought the urgency of the case required, and woe to him who could not find, in some provision of the Constitution, that construction which would best serve the demands of the occasion.

The old maxim, *inter arma silent leges*, expresses but half a truth. War does not merely silence the law. It perverts it. It does not merely substitute force as the governing power for the time being, but it makes force take upon itself the name of law, — not only to stand in its place, but to claim to be law itself, and this not merely where martial law may rightly exist, but wherever usurpation extends it.

Most especially has this been true, during the late war, as regards Constitutional Law. There has not been anything that it was supposed it might be desirable to do, in reference to the rebellion, that there has not been some one found ready to swear that the Constitution authorized that very thing. If it was the declaration of martial law (which places all persons under military rule and the power of force, when in legitimate operation), over the whole country, — over places where there

had never been a soldier in arms, except as he enlisted and left forthwith for the scene of conflict,—men were sure that the Constitution authorized it, because they were told that it was necessary for the suppression of the rebellion. If it was the suspension of the *habeas corpus*, which suspension deprives all persons arrested of the right to have an inquiry into the cause why they are imprisoned,—it must be constitutional to suspend it, and to place the whole community at the mercy, or the want of mercy, of those who held power for the time being, because the reason of the hour demanded the suppression of the rebellion; and the unreasoning excitement of the hour acquiesced in any and every measure which it was told was necessary to the accomplishment of that object. If it was the suppression of the trial by jury, and the substitution of court-martials and military commissions;—that time-honored institution, secured by our remote ancestors in the great charter, and reëstablished here in constitutions and bills of rights and statutes, was not only surrendered without a sigh, but men desired to offer it up a sacrifice to evince the sincerity of their patriotism.

The hour was governed and controlled by an imaginary “military necessity,” and whenever the party leaders desired that anything should be done, there was at once a military necessity to do it.

It was within the limits of an adjoining State that an ambitious aspirant for congressional honors deemed it expedient, upon the occasion of his nomination, to secure favor by pledging himself, in advance, to support “any military necessity to which the administration should see fit to resort”; which was but the phrase of the day for a pledge to support every arbitrary measure which those who were in power should adopt,—and he was elected. Patriotism has nothing to do with such a declaration. Party subserviency can go no farther than this.

Was it desired to exercise a power nowhere granted in the Constitution, and directly at variance with some of its provisions, and negatived by all its history, instead of resorting to the right of revolution for its exercise, which might have been sufficient to cover the case, and for which the exigency might have been considered a sufficient warrant,—it was found that “the war power” not only swallowed up all the other powers, and all the guarantees of the Constitution, and the

rights of the States and of the people, but conferred the unlimited power to do whatever the necessity of the case required, — the necessity of the case of course requiring whatever those who held power desired to do. And a pamphlet, which, through “the war power,” placed the President and Congress beyond all the restraints of the Constitution, and argued that the law of nations (uncertain and changing as that law is) was above the written Constitution of the United States, not merely in reference to our intercourse with foreign nations, but in regard to the internal affairs of the country, was honored with stereotype editions, circulated by societies, and held by grave doctors of divinity writing upon constitutional law, to be an “exhaustive treatise” upon that subject.

● The Constitution of the United States was formed, as you are aware, in 1787; was adopted in 1788; and the government under it was fully organized in 1789.

The period immediately preceding its adoption had been one of great solicitude to many who had been actively engaged in the war for independence, in and out of Congress; and who were aware of the difficulty of conducting the intercourse of the new States with foreign nations, under the limited powers conferred upon Congress by the Articles of confederation, — and the still greater difficulty, perhaps, of reconciling the conflicting interests of the different States in relation to their trade and commerce.

The common feeling of patriotism, arising out of antagonism to the rule of the British government, which had bound them together during the war of the Revolution in which they made a common cause, was fast giving way to the selfish spirit natural to all communities, and which made each State desirous of deriving the greatest benefit from her natural or acquired advantages. And the discontent of those States which found themselves burdened with debts incurred in the common defence of their rights and liberties, without the means of payment from public lands, and without great commercial advantages out of which to create the means of payment, must have been a source of no small anxiety to any one who reflected upon the probable future of the new States.

Jealousies and divisions, regulations and counter-regulations, offences and retaliations, wars, and conquests and oppressions,

were very clearly foreshadowed, unless wise counsels, directed by a merciful Providence, should avert such calamities.

To the credit of New York and Virginia, let it be said that they led the way in a measure for relieving the discontent by cessions of their claims to lands, which were to be held for the common benefit, not however, it must be admitted, until grave complaints had been made by New Jersey, Maryland, and other States, respecting the injustice which would be done if the unsettled lands, which had belonged to the Crown, and which had been wrested from Great Britain by a common expenditure of blood and treasure, should be held by the States within whose limits they lay, according to their charters. But this, perhaps, should not detract from the credit due to them for their respective cessions. No nation or community is to be expected, unasked, or even without a very strong pressure, to surrender its claims to territory. The love of territory may be said to be a national weakness.

The discontent respecting territory being allayed by these and other cessions of public lands, the antagonism of commercial interests still remained, and with this subject that of intercourse with foreign nations was intimately connected. Notwithstanding the provisions of the Articles of confederation, by which no State, without the consent of the United States, should enter into any confidence, agreement, alliance, or treaty, with any king, prince, or State, nor into any treaty, confederation, or alliance, with any other State, without such consent, specifying the purposes and the length of time it should continue, and that no State should lay any imposts or duties which might interfere with any stipulations in any treaties entered into by Congress, it must have been evident that the different States might, by legislation, attempt to attract foreign commerce to their own ports, and also to exclude other States from the natural advantages of navigation within their harbors and rivers.

The difficulties which arose between New York, on the one hand, and New Jersey and Connecticut, on the other, at a much later date, in regard to the exclusive navigation of the waters of the former by boats propelled by fire and steam, — which were peaceably settled by a decision of the Supreme Court under the Constitution, and which could have been settled in no other way, except by the submission of one party, or by force and

violence, — serve as an emphatic commentary upon the wisdom of those who saw the necessity, for certain purposes, of something more than the Articles of confederation, to wit, another government, which should, in its sphere, provide for the welfare of the whole country, instead of leaving that welfare to depend on the selfish interests which might actuate the component parts of the Confederation.

The difficulties respecting regulations of commerce, and a controversy between Virginia and Maryland, concerning the navigation of the Potomac, led the General Assembly of Virginia to appoint commissioners to meet such commissioners as might be appointed by other States, “to take into consideration the trade of the United States; to examine the relative situation and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as, when unanimously ratified by them, will enable the United States, in Congress assembled, effectually to provide for the same.

Commissioners were appointed from nine States, but none attended from four of those States.

The commissioners who assembled recommended endeavors to procure the concurrence of the States in the appointment of commissioners to “devise such further provisions as shall appear to them necessary to render the Constitution of the Federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress, as, when agreed to by them and afterwards confirmed by the legislatures of every State, will effectually provide for the same.”

It may not be amiss to mark here that these proceedings, as you readily perceive, look to additions or amendments to the Articles of confederation, and not, as yet, to the formation of a national government; and as you doubtless are aware, also, that the evils which led to these proceedings, and for which a remedy was sought, related to commerce, navigation, and intercourse with foreign nations, and had no reference to suffrage, or any matter regarding the purely internal affairs of the States. It was not for the regulation of any such matters that a change in the existing condition of things was proposed or desired. It

was, of course, the less probable that any such change should have been made.

But here came grave difficulties. How were powerful States, or even small States, to be induced to give up their natural advantages for the benefit of others less favored?

It was perhaps but natural that Rhode Island, a small State, with a good harbor, easily accessible, and which would have but the smallest representation in any Congress, should prefer to adopt her own measures to secure the commerce which she desired, and for that reason to decline to become a party to a convention, which, in adopting regulations of commerce, might not leave her the benefit of her natural advantages. Undoubtedly there lay behind this consideration the consciousness that her more powerful neighbors, Massachusetts and Connecticut, might, if left at liberty, compel her to comply with their commercial regulations; but so long as the Articles of confederation existed, (and they provided for a perpetual league,) no State could make war upon another State, nor could the Confederation make requirements upon a State to give up any of her rights. Any attempt, therefore, to compel any State to forego her advantages, and conform to the regulations and wishes of any other State, would have been, as matters then stood, an unwarrantable interference with the rights and privileges of such State.

In the convention which followed, there was comparatively little difficulty in agreeing upon the provisions of the Constitution relating to commerce, foreign and domestic, and those which had regard to intercourse with foreign nations.

The antagonism of interests and opinions exhibited itself in the convention mainly upon questions regarding taxation, the raising of revenue, the distribution of political power, and the importation of slaves.

There was an effort made to give the new government power to tax exports, strenuously resisted by the Southern delegations, because, as they alleged, such a measure would bear unequally upon that section.

Another and great source of contention was the rule of taxation. It seemed to be generally supposed that no small portion of the public revenue must be derived from direct taxation, and the question was, by what rule the apportionment of such taxes

should be made among the several States. Connected with this, was the question, upon what basis should the representation in the House of Representatives of the new government be apportioned among the different States. The controversy turned very much upon the question, whether the number of the slaves should be taken into the enumeration of the population of the several States, with reference to these objects, and upon these questions the two great sections, North and South, were at cross purposes, the Southern delegates contending that the slaves ought not to be taken into the account in determining the proportion of taxes to be assessed, but ought to be enumerated in making up the proportion of representatives, and the Northern delegates generally maintaining the converse of both propositions. It resulted in a compromise, by which three fifths of the number of slaves were to be included in the enumeration in each case. That taxation and representation should go together was one of the maxims upon which the Revolution had been founded.

A controversy of a similar character had arisen under the Confederation, in regard to the apportionment of the "quota" to be furnished by the several States for the public service, which was settled in the same way.

It is not inappropriate, perhaps, to remark in passing, that while the slave States had, until the late rebellion, the full benefit of the compromise in relation to the representation, the free States had received very little advantage from it in regard to taxes, almost all the revenues of the government having been derived from other sources than direct taxation.

Another question arose, whether the new government, which was to have the power to regulate commerce, should have the right to prohibit the importation of slaves. This connected itself in some measure with the other questions, as importations increased the number of slaves, and so would give greater rights of representation, as well as subject the States, into which the importations were made, to greater burdens of taxation. The danger of the burden was not considered, however, as forming an objection to the importation, and there was a strenuous effort to insert a provision restraining the power of Congress upon that subject. This resulted in a compromise, by which Congress were restrained from exercising that power prior to 1808, but allowing a tax to be imposed on such importations, not exceeding ten dollars for each person.



There was also inserted the clause by which fugitive slaves were to be delivered up, probably as a part of the same compromise, the resolution in favor of it passing without objection.

The question respecting the right of suffrage in the election of representatives in Congress, and electors of president and vice-president, elicited but little debate, and was quietly disposed of by adopting, in each State, the rule of the State regulating suffrage, whatever that might be.

There was no proposition for the abolition of slavery, nor anything having the remotest reference to the incorporation of any such power into the Constitution. It is perhaps safe to say, judging from the Constitution and the debates, that a proposition of that description would not have commanded the vote of a single State in the Convention.

Slavery existed at that time in all the States except Massachusetts, where it was held to be abolished by a clause in the State Constitution, which was doubtless intended, when incorporated into that instrument, as the expression of a general truth, and not for the purpose of effecting such an abolition. A similar clause in the Bill of Rights of Virginia, and one in New Hampshire, were not held to have any such effect. Connecticut had made provision for its future extinction.

It was not to be expected that these compromises should reconcile all the people to the new government proposed to be instituted, but without any of them it must have failed of commanding the assent of all the States; and if without these compromises it had been adopted by the requisite number, nine States, and had gone into operation as the Constitution of those States, leaving the others to take care of themselves, it would probably have then led to a Southern confederation, with what further result, in a few years, there are no means of forming any reasonable conjecture. It might have been new efforts for a union, through some compromise by which all would have become united under one Constitution. It might have been antagonism, through a conflict of interests, and a sectional war. The sure result of any plan which did not command such an assent as to render further opposition fruitless, would have been a distracted and divided country, neither efficient at home nor respected abroad.

After the formation of the Constitution there were grave doubts respecting its adoption. In several of the States the

majority of the delegates in its favor was quite small. Its great danger was the jealousy which existed in regard to civil liberty and personal security, and in regard to the right of the States to manage their local affairs. This jealousy was manifested nowhere else to the same extent as in New England. But for the fear that the Constitution would be wholly lost, if any conditions were annexed to its acceptance, such conditions being in fact non-acceptance, its adoption in many of the States would have been on condition that certain amendments should be incorporated into it, or in other words it would have been rejected until thus amended. It was only on assurances that several of the most important of these proposed amendments would afterwards be added, that its adoption was secured through strenuous efforts for that purpose, and it was amended, accordingly, immediately after its adoption.

I have sketched this brief history of the causes which led to the formation of the Constitution of the United States, and the circumstances attending its adoption, because the study of its history serves to show how its framers were enabled to agree upon a constitution, to elucidate its provisions, and to exhibit the purposes and limits of the government instituted by it. And the amendments proposed and adopted, mark the care and jealousy with which the people of that day guarded the existence and rights of the States, and the liberties of the citizen, and the reluctance with which they surrendered a portion of those rights and liberties to the care and control of the new government of the nation, although the surrender related principally to matters of national concern.

He who desires to have accurate ideas upon this subject will do well to study carefully the amendments to the Constitution, made immediately after its adoption, in connection with similar provisions in the constitutions of several of the States, and he will be assured that it was not one of its purposes to enable the new government to interfere with the internal concerns of the States, nor to interfere, except in limited instances, with the liberties and privileges of the people under their State constitutions.

The differing views in relation to the adoption of the Constitution, its true character, and the dangers to be apprehended from it, very soon extended to the administration of the gov-

ernment under it. Those who favored it, and sustained the earlier administrations under it, were denominated Federalists ; those who opposed the administrations and who were zealous for individual rights and State rights, took the name of Democrats. The former were accused of favoring a strong government. The latter admitted that they were in favor of a strict construction of the powers of the new government, and feared that it would subvert or impair the rights of the States.

Under the administration of John Adams, the opposition became very violent.

Connected with the controversies arising from national politics, and aggravating those controversies in a great degree, was the excitement respecting the French Revolution ; and two acts of Congress were passed under his administration, popularly known as the Alien and Sedition Laws. Instead of preventing attacks upon the administration, which was one of the purposes of these acts, they only rendered such attacks more violent and abusive. The constitutional power to pass such acts was denied, and a new impetus was given to the fears that the liberties of the citizens were in danger from the action of the Government of the Union, and this gave rise to the celebrated Virginia and Kentucky resolutions of 1798 and 1799.

These resolutions served for a long time, I think, as a kind of platform for the democratic party ; and what has been a much more mischievous consequence, they furnished a tangible basis for the idea upon which Mr. Calhoun attempted, in the first instance, to maintain the doctrine of nullification, and failing of that, afterwards, the doctrine of secession. As an exposition of the constitutional right of the States to interfere, and pronounce upon the constitutionality of the laws of the United States, and provide a remedy against particular acts of unconstitutional legislation, they are unquestionably very vague and uncertain ; and it may well be doubted whether the distinguished authors of them had any very clear idea in what way the constitutional remedy which they indicated was to be applied.

The Virginia resolutions, drawn by Mr. Madison, were passed by the Assembly in December, 1798.

They declared, "explicitly and peremptorily," that the Assembly viewed "the powers of the Federal Government, as resulting from the compact to which the States were parties, as limited by the plain

sense and intention of the instrument constituting that compact, and no farther valid than they are authorized by the grants enumerated in that compact; and that in the case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the States, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties, appertaining to them."

The Assembly expressed "its deep regret that a spirit has in sundry instances been manifested by the Federal Government to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases, (which having been copied from the very limited grant of powers in the former articles of confederation were the less liable to be misconstrued,) so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases, and so as to consolidate the States, by degrees, into one sovereignty, the obvious tendency and inevitable result of which would be, to transform the present republican system of the United States into an absolute, or, at best, a mixed monarchy."

The Assembly then particularly *protested* against the palpable and alarming infractions of the Constitution in the two late cases of the "Alien and Sedition Acts," which were denounced as the exercise of powers not delegated by the Constitution.

And in conclusion the Assembly, expressing "the most sincere affection for their brethren of the other States; the truest anxiety for establishing and perpetuating the Union of all; and the most scrupulous fidelity to that Constitution, which is the pledge of mutual friendship, and the instrument of mutual happiness," solemnly appealed "to the like dispositions in the other States, in the confidence that they will unite with this commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional; and that the necessary measures will be taken by each, for coöperating with this State, in maintaining unimpaired the authorities, rights, and liberties, reserved to the States respectively, or to the people."

With the exception of the assertion of the right and duty of the States to interpose for the purpose of arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties, appertaining to them, there is nothing unconstitutional or revolutionary in these resolutions. And as this is asserted only in case of a deliberate, palpable and

dangerous exercise of powers not granted, although there is no warrant in the Constitution for such interference by the States, it may not be regarded as a very obnoxious assertion of the right of revolution, under such circumstances, were it not that the right of revolution is a personal, and not a State, right.

The resolutions were accompanied by an address to the people, containing warnings against usurped power, which may have a significance beyond the period of the address itself. They propose no action of a revolutionary character. Copies were transmitted to the other States, several of which responded, in some instances very curtly denouncing this attempt at interference as unconstitutional; and some of them approved and defended the obnoxious acts.

On the reception of these responses, the subject came again before the Assembly of Virginia, and Mr. Madison made a most elaborate report on the subject, concluding with a resolution reaffirming the previous action of the Assembly.

The original draft of the Kentucky resolutions of 1798, was by Mr. Jefferson. The first resolution declares that the several States

“are not united on the principle of unlimited submission to their general government, but that by compact they constituted a general government for special purposes; delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; that whensoever the general government assumes undelegated powers, its acts are unauthorized, void, and of no force; that to this compact each State acceded as a State, and is an integral party; that this government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself”; . . . . “but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infraction as of the measure and mode of redress.”

In 1799, taking into consideration the answers of the other States to the resolutions of 1798, the Assembly of Kentucky resolved, among other things, —

“that this Commonwealth considers the Federal Union, upon the terms and for the purposes specified in the late compact, conducive to the liberty and happiness of the several States; that it does now unequivocally declare its attachment to the Union, and to that compact, agree-

ably to its obvious and real intention, and will be among the last to seek its dissolution; that if those who administer the general government be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of power therein contained, an annihilation of the State governments, and the creation, upon their ruins, of a general consolidated government, will be the inevitable consequence; that the principle and construction, contended for by sundry of the State legislatures, that the general government is the exclusive judge of the extent of the powers delegated to it, stop not short of despotism, — since the discretion of those who administer the government, and not the Constitution, would be the measure of their powers; that the several States who formed that instrument, being sovereign and independent, have the unquestionable right to judge of the infraction; and that nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy.”

The assertion in these resolutions that the Constitution was a compact between the several States, and that nullification by the States of unauthorized acts of the United States was the rightful remedy, was of most mischievous tendency; and bitter has been the fruit of the seeds thus sown. But in other respects they contain some important truths, which may well be pondered at the present time.

The embargo of 1807 bore very heavily on the interests of New England, and its constitutionality was denied, but there was no assertion of a right to stop its operation by State authority. Its constitutionality was tested in the Circuit Court of the United States, and the decision in its favor was acquiesced in.

The next assertion of the right of the States to interpose, because the United States government had exceeded its powers, comes undoubtedly very much in the shape of a threat of disunion, not from any State, but from one of the representatives of a State, on the floor of Congress. It was at the session of 1810–11, in a debate on a bill for the admission of Louisiana into the Union, that Mr. Quincy said, —

“I am compelled to declare it as my deliberate opinion, that if this bill passes, the bonds of this Union are virtually dissolved; that the States which compose it are free from their moral obligations, and that as it will be the right of all, so it will be the duty of some, to prepare definitely for a separation, — amicably if they can, violently if they must.”

The preparation, however, was not made.

The war of 1812, which also affected the interests of New England adversely, led to great party excitements. The denial, by the Governor of Massachusetts, of the right of the United States to order the militia of a State on duty out of the State, and the refusal to place the militia under the officers of the United States, brought that State very nearly into collision with the authority of the United States. The same was true of Connecticut also. And these and other sources of complaint led to the Hartford Convention. There is nothing in the resolutions of that convention which asserts a right of nullification, nor that advocates disunion; but assembling, as it did, in time of war, and at a gloomy period of that war, and holding its sessions in secret, it was regarded with grave distrust, and undoubtedly gave great uneasiness to the administration of Mr. Madison. Peace came just at the close of its deliberations.

The peace of 1815 brought a cessation of party conflicts, as it is devoutly to be hoped peace may do again.

Mr. Calhoun was the leader in introducing the protective tariff, in 1816; but the experience of a few years made a tariff for protection a subject of controversy. From the very constitution of society the protected products increased much more at the North than at the South. The tariff was thereupon denounced as unconstitutional, and on a failure to procure a repeal of the protective duties, Mr. Calhoun and his followers asserted the right of the States to nullify the acts of Congress, as a peaceful remedy against unconstitutional legislation.

It is a matter of curious history to note the changes of this period, and trace them, so far as we may, to their causes in the personal ambition of prominent politicians; but this is foreign to my purpose at this time.

From the defeat of the attempt by South Carolina to nullify the tariff laws, in 1832, the political controversies assumed more and more of a sectional character, as most of you must be aware. There were divers causes of discontent on both sides.

The hostility at the North to slavery, because of its immorality and injustice, and the large representation in Congress founded upon it, was increased and intensified by the haughty and dominant tone of the slave-holding interest, and especially by the indignity offered to a most worthy citizen and learned jurist of Massachusetts, who was appointed an agent of the State

to reside in South Carolina, for the purpose of testing by suit, in the courts of the United States, the constitutionality of certain police regulations, under which colored seamen from the free States were subjected to imprisonment during the stay of their vessels in the port of Charleston ; — and who was compelled to leave that State with threats against his life, the State authorities being, if not in complicity, at least powerless to protect him.

Attempts to extend slavery into the territories, first by Congressional legislation, and then by judicial decision in defiance of Congressional legislation, and the high-handed measures for the introduction of slavery into Kansas, in order to secure another State in the Southern interest, raised the excitement to a pitch which rendered many in the North ready for a collision.

Personal liberty laws were but the legitimate or illegitimate fruit of all these things.<sup>1</sup>

Secession, as a "peaceful remedy" for alleged infractions of constitutional right, came next, and that brought war.

For years previous, the parties, so far as the division was North and South, had disagreed in relation to the true character of the Constitution. Mr. Calhoun, following the language of the Virginia and Kentucky resolutions, insisted, that it was a compact, to which the States were parties, — that a violation of it released them from its obligations, — that there being no common arbiter to determine in relation to infractions of it, each State must judge for itself whether the compact was broken, and what ought to be the remedy, and might for that reason secede, whenever it should determine that the violation of it required that remedy.

On the other hand it was contended, Mr. Webster being for years the leader in the debates in Congress upon the subject, that the Constitution was an organic law, adopted by the whole people, that its obligation was like that of the State Constitutions, and perpetual ; and that there was no right on the part of any State, either to nullify the laws of Congress, or to separate itself from the Union.

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<sup>1</sup> In 1855 Massachusetts was a strenuous advocate for "State rights," particularly the right of *trial by jury*, and the privilege and benefit of the writ of *habeas corpus*. See Appendix, Note C.



If the first of these positions were the true view, secession was lawful, and the remaining States had no cause of complaint. If the latter, then the hostilities which followed the acts of secession, on the part of the seceders, were undeniably acts of treason, and punishable as such.

Let it be impressed upon our memories, that the leading principle of those who denied the right of the States to interpose, to nullify, to secede, has been, from the first, that the Constitution was an organic fundamental law, of perpetual obligation, and not a compact; that there was no right in any State or States, or in the people of any State or States, to refuse obedience to its authority, exercised within constitutional limits, (of which the judiciary were to judge,) or to nullify its provisions, or the laws made under it, or to escape from the bonds of the Union in any other mode than by a successful revolution, and that all attempts so to do were treasonable, and all acts passed for such purposes were void.

The government, immediately upon the inauguration of Mr. Lincoln, placed itself upon this ground, which had long been the doctrine generally of the party which elected him. And it was upon this principle that the United States entered upon the war, to which they were forced by the attempt at secession.

It was for the purpose of suppressing a rebellion, and not for the purpose of fighting a foreign foe, that the armies were marshalled for the conflict.

So was the resolution of Congress, most explicit in its terms, "that this war is not waged on their part in any spirit of oppression, or for any purpose of conquest or of subjugation, or purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution, and to preserve the Union, with all the dignity, equality, and rights, of the several States unimpaired; and that as soon as these objects are accomplished, the war ought to cease."

It was upon this ground that troops were called for, and men volunteered, and perilled their lives, and gave themselves to death upon the battle-field.

The war, on the part of the United States, was not only begun upon the ground that the resistance to the authority of

the United States was treasonable; that it was an insurrection, a rebellion, and that all engaged in it were liable to be punished as traitors; it was prosecuted upon this ground throughout.

It was upon this ground, and could only be upon the ground that the United States were attempting to suppress a rebellion, that so much dissatisfaction was justly expressed at the premature recognition of the Confederates as belligerents, by Great Britain and France. If both parties had belligerent rights of precisely the same character as those existing in a foreign war, the right of conquest included, we had no cause of complaint that Great Britain and France recognized that fact, and we could not have had a right of conquest unless the other party to the war had belligerent rights.

It was upon the ground that we were attempting to suppress a rebellion, that prosecutions for treason were instituted, and that property was confiscated.

It was upon this ground that the final victory was achieved.

And it is upon this ground that Jefferson Davis, and men of lesser note, are at this moment held as prisoners for trial, and liable to suffer the penalties of the law for the punishment of treason.

The war must be held to have rendered the judgment of arms against the doctrine of the Virginia and Kentucky resolutions, that this is a compact of States, and that States may interpose and nullify the laws of the United States, or may secede from the United States; but having thus rejected the doctrine that a State may nullify or secede, and maintained that the acts of secession are unlawful and void, and so not the acts of the State, but the unlawful acts of persons who are liable for their offences, we are not at liberty to turn round and say that these void acts, which no State could pass, did notwithstanding change the relations of the State to the United States, so that the war was in all respects like a foreign war, and that the suppression of the rebellion was the conquest of the States.

Let me say again, as I have said upon another occasion, if the State had no right to pass the act of secession, it was not the act of the State. It was the act of persons assuming the authority of the State. One of the United States, as a State,

cannot sever itself from the United States but by revolution. That is settled so far as it can be settled. Then the act by which it was attempted to make the severance is not the act of the State, because the State acts only through persons authorized by it, and it could give no authority for such an act. The persons who passed the act of secession could do no act, as the act of the State, which the State could not, and did not, authorize them to do.

It is astonishing what a deal of flummery has been spoken and written on this subject.

Take for instance a pamphlet recently published, by a writer on criminal law, from which the following are extracts:—

“It has been assumed, even by men who are not Curserers of Ham, that, since the States seceding had no power to withdraw from the Union, therefore their several acts of secession were, in law, nullities; leaving the States to stand, toward the general government, in the same legal situation as if the acts had not been passed.

“Let it, then, be stated, that this proposition has no foundation either in the law of the case or in the facts of the case. It is sustained by no decision of any court, by no *dictum* of any judge, by no observation of any writer on constitutional law; it rests only in mere loose assertion, made, since this rebellion broke out, by persons who, whatever might have been their capacity to form a correct opinion, had given to the question no adequate investigation. The phrase, ‘*The act of secession is a nullity*,’ is, in most instances, practically employed for one or the other of two opposite purposes: either, to convey the idea that the utterer of it is intensely loyal; or, on the other hand, to impress on the hearer’s mind the falsehood, that no evil consequences can lawfully be made to fall upon the participators in secession, since the act of seceding is a null act.

“Looking at this question as one of fact, we all know — every boy in the land knows, it is known even to the most ignorant peasant in Europe — that the proposition which asserts the act of secession to be a nullity is false. I say, everybody knows that secession was *not a nullity in fact*. Upon the act of secession, the State which had passed it, ceased to have a governor, judges, legislators, and other State officers, performing their several official functions under the recognized binding obligation of an oath to support the Constitution of the United States.

“Is, then, the relation of the seceded States to the United States one thing in fact, and directly the opposite thing in law? These

States are, as they always were, bound by law to render allegiance to the United States; *it is a fact of the law* that they are so bound. Do they, therefore, *render allegiance in law*? If yea, why is this war? If their relations are not changed in law, what has the law to complain of? And, pray tell, have we the right to fight a State, or a man, whose *conduct in fact* has wrought no change in *his relation to us in law*?

"If it be true that secession has wrought no change in legal relations between the seceded States and the United States, then the United States has no legal right to complain of it. Complaint might, indeed, be made of such action of the people as capturing forts, marching armies against us, and the like, but *not of the act of secession*. And it is a general proposition, — a proposition to which, so far as I know or believe, there is no exception, — that *no man has any legal right to complain of any act which does not change the legal relation between himself and the doer of the act*. From this proposition comes another, or rather, the other is the same proposition as this, put in a different shape, and applied to the particular subject of our present discussion, namely, — *If secession has not changed the legal relation of the seceded States to the United States, then, as the United States has no legal right to complain, so these States had the legal right to secede*.

"But, in truth, the act of secession did work as great a change in law as it did in fact. If it wrought no other change, it placed the seceded States in the place of delinquents from duty, and placed the United States under obligation to come down upon them with all its power, military and civil. It annulled all those civil rights which they derived under the Constitution, and which pertain to the ordinary condition of peace; because such is the effect of war; and that the United States is now constitutionally carrying on against them, war in its full sense, with its full consequences, we have already seen to have been adjudged by the Supreme Court."

It would be amusing, if it were not painful, to witness the utter confusion of principles exhibited in these extracts.

A State, in its character of a political body or existence, having as such, rights, powers, and duties, which it can enforce, exercise, and perform only through the agency of persons, who being duly authorized may, in reference to such rights and powers and duties, represent, and act for, and bind the political body or existence called the State, is one thing; and persons, who, in relation to matters over which the State has no power, do not, and cannot represent the

State, and so do not, and cannot bind the State, but who, by unlawfully attempting to represent the State, may and do render themselves liable for their own acts, is another and a very different thing. The distinction is palpable, but it is completely ignored by this writer, and by others who ought to know better, as if no such distinction ever existed. And yet this distinction is derived from a familiar principle of the law of agency, perfectly applicable, by analogy, to this case.

How often do we hear a State likened to a corporation in reference to the acts which it may do, and the instrumentalities which it may employ. How much oftener, even, do we hear the members of the legislature, and other officers spoken of as agents of the State. It is true, that the States are not strictly corporations, and that the relation between the State and its officers is not technically one of agency. But it is nevertheless true, that the principles to which I have alluded apply. A party cannot authorize his agent to do what he himself has no power to do, and no person can justify, under the authority of another, for any act which that other could not empower him to do.

So a State cannot confer power on an agent to do what the State itself has no right to do, whether the agent has a legislative character, or is a special agent; and any person assuming to act under the authority of a State, in a case where the State has no right, does not represent the State, nor bind the State, and cannot justify under the State.

Again, this author says the States are bound by law to render allegiance to the United States. This is arrant nonsense. Allegiance is due from the subject to the monarch, from the citizen to the Government, and it is common to require parties to take an oath of allegiance. The citizen swears that he will bear faith and true allegiance to the State, and he swears that he will support the Constitution of the United States. The violation of the ligeance incurs, or may incur, the penalty of treason. It is personal entirely. A State neither owes allegiance, nor can commit treason.

Again, he says, everybody knows that secession was not a nullity in fact, and so he reasons that it was not a nullity in law.

If by the first part of the proposition, he means that by the

acts of individuals, assuming to act for the States, the States were disorganized, so that they no longer performed their proper functions in the Union, then no doubt secession was not a nullity in fact, but even with that meaning, the conclusion that it was not a nullity in law, would be a very complete *non sequitur*. If the acts were unlawful, then there was no legal secession, and secession in law is legal secession. •

If by nullity in fact, it is meant that in fact there was secession, the proposition is not true ; the war, as we have seen, has disproved it. There was no secession. The attempt failed. There was rebellion, and usurpation, and war, but not secession.

Again, in one of the paragraphs above quoted, the writer asserts that if secession has wrought no change in the legal relation between the seceded States and the United States, the United States have no right to complain ; and he enunciates the proposition, as without exception, "that no man has any legal right to complain of any act which does not change the legal relation between himself and the doer of the act." And he then says, "if secession has not changed the legal relation of the seceded States to the United States, then as the United States has no legal right to complain, so these States had the legal right to secede."

This is law and logic both run mad. My tenant subverts the soil in certain places, contrary to his right, and he cuts down shade-trees and commits other waste ; but the legal relations between us are not changed by these wrongful acts. The legal relations were those of landlord and tenant. He is my tenant still. I may have an action against him, appropriate to such a state of facts, because he has acted in violation of the rights derived from the legal relations which subsist between us. But if I bring the action, it does not dissolve the legal relations. If he should do another similar act, I might have another action, for the reason that the relations still subsist. But the logic of this writer would prove that if the relations subsist, the act is justifiable.

I appoint an agent to receive certain property in trust, and deliver it over to me. The agent accepts the trust, receives the property, and appropriates it to his own use. The legal relations between us are not changed. He is my agent still, and

therefore on the reasoning of this writer I have no right to complain, and the act is justifiable. That seems to be the logic.

But it will be said that by the conversion he becomes a wrongdoer, and so changes the relations between us. True he stands in the relation of a wrongdoer to me. That however is not his legal, but his illegal, relation to me. His act does not even change my legal relations to the property, which I may take, if I can lay my hand on it.

And so the secessionists, by wrongfully converting the State offices to their own use, and claiming to act under State authority, did not change the legal relations between themselves and the United States, or between the State and the United States, but by these acts assumed relations which being wrongful and illegal have no operation upon the legal relations before subsisting. How far they are legally responsible to their own States, for their usurpation, as well as to the United States for their treason, we need not discuss. It may be that the usurpation of the State authority existed only in relation to the United States, being only in opposition to, and in violation of their duty to the United States.

Again, this writer says, the act of secession, "if it wrought no other change, placed the seceded States in the position of delinquents from duty, and placed the United States under the obligation to come down upon them with all its power, military and civil. It annulled all those civil rights which they derived under the Constitution, and which pertain to the ordinary condition of peace, because such is the effect of war."

The delinquency from duty, so far as *State action* is concerned, was in not sending senators and representatives to Congress, which may perhaps be quite as truly regarded as an omission to exercise a privilege or a right. Certainly there is no State delinquency in that, or in any other act or omission, lawfully authorized by the State, so as to become a State act, which required the United States to "come down" upon the State itself. It is quite sufficient, for all the purposes of the United States, to come down, effectually, upon the Rebels, who by their usurpation and treason caused the delinquency, and who could not annul all the civil rights of the State derived under the Constitution.

So far from its being true, that all the civil rights of the State

were annulled by the secession, the same writer but a few pages farther on contends that the United States is bound to execute the guaranty of a republican form of government to the seceded States. Now if such *duty* exists on the part of the United States, then there is a *corresponding right* on the part of the seceding States to have that duty performed, and so there is one civil right, at least, derived to the States under the Constitution, and which pertains to the ordinary condition of peace, which, on his own showing, is still a subsisting right. — But further ; this admission that the United States are bound to the performance of that duty, overthrows the whole argument of the writer on this subject. If the United States are bound by that guaranty, it is because the States are still in the Union, as States, and so secession is a nullity in law and in fact ; and there is no need of readmission. There is no such guaranty to territories, and more especially to countries or States which have been conquered. It is perfectly absurd to say that the States are out of the Union, or have become territories, or have been conquered, in any sense which implies that they are not existing States in the Union, under the Constitution, and at the same time to attempt to maintain that it is the duty of the United States to guarantee to them a republican form of government, under this clause of the Constitution, which applies to States in the Union, and no other. This writer is not the only party who has been guilty of the inconsistency of contending, that the seceding States are not in the Union, and in the next breath asserting the duty of the United States to guarantee to them republican forms of government, as States.

But it may be urged that the entire people united in this attempt to secede, and that the people constitute the State ; that we cannot separate the people from the State which they constitute.

In some connections, and for some purposes, this is undoubtedly true.

“ What constitutes a State ?

Not high-raised battlement or labor'd mound,

Thick wall or moated gate ;

Not cities proud, with spires and turrets crown'd ;

Not bays and broad-arm'd ports,

Where, laughing at the storm, rich navies ride ;

Not starr'd and spangled courts,



Where low-brow'd baseness wafts perfume to pride  
 No: Men, high-minded men,  
 With powers as far above dull brutes endued,  
 In forest, brake, or den,  
 As beasts excel cold rocks and brambles rude;  
 Men, who their duties know,  
 But know their rights, and knowing, dare maintain,  
 Prevent the long-aim'd blow,  
 And crush the tyrant, while they rend the chain:  
 These constitute a State."

Will those who maintain the doctrine that the *States* seceded, in fact and in law, and that they thereby lost their *status* as States, and have been conquered, because the people passed acts of secession and have been defeated, accept this definition, according to which the people constitute the State?

Some zealous persons argue that it is preposterous to attempt to distinguish between the State and the people of the State. But the distinction is plain, and must be made in relation to this and other subjects.

The signification of language oftentimes depends upon the subject-matter to which it is applied. The same terms mean different things in different connections.

If we say that a State defended itself gallantly, we speak of the acts of the persons who were active in its defence. And so when we say that a State is proud, haughty, self-sufficient, vain-glorious, violates its obligations, &c., we refer to the disposition, temper, vanity, and acts, of the people of the State.

But if we are discussing the legal rights of a State, the term has a different interpretation affixed to it. If we say that a State owns a certain tract of land, we mean that the title is in the political organized existence called a State. All the persons in the State, put together, do not, as persons, own that land. If we say that the State has a right to send senators and representatives to Congress, we mean that this organized political existence has that right. All the people of the State, collected in one vast primary meeting, could not constitutionally exercise it, even by a unanimous vote.

And so when we say a State cannot secede, and has not seceded, it is meant that this political existence, organized under its own constitution, and bound to its place in the Union by the Constitution of the United States, has not broken that bond, so

as to get out of the Union, and cannot break it by any act of secession. All its people assembled together could not, by their unanimous act, take this political existence out of the Union, except by successful revolution; and if so, they cannot call a convention, and authorize that convention to do it.

If a pestilence should sweep from the face of the earth every man, woman, and child in a State, the Union would not be dissolved thereby, nor the State dissevered from it. The laws of the United States would still be in force there, as within the limits of a State. Emigration might supply a new population, the custom-houses be reënfenced, new officers appointed, the existing laws of the United States executed, and the State be reorganized (not reconstructed) under its constitution, and resume all its functions as a State in the Union without any enabling act, or any new admission.

There is no provision for calling a first meeting in such a state of things. It would be *casus omissus*. But whether by presidential proclamation, or in what other way, the first step being taken, and officers elected, all else would follow of course.

Let us take another view of this subject. It is a very clear proposition, that in this rebellion by the people of the South, there is no change of the Constitution. Those who were in duty bound to support the Constitution before the rebellion, if they are in existence, are bound to support it still. The duty of allegiance remains as it was before the war. Any new outbreak against the government, in the disorganized States, would be treason, in the same manner that it was treason in the commencement of the war. And this may serve to show that there has been no change in the legal relations of these people to the United States, and no conquest of territory; for the inhabitants of a conquered territory, until they owe allegiance to the conqueror, whatever other offence they may commit, do not commit treason.

The judges of the United States may at any moment resume their functions in those States, without the passage of any law whatever to enable them to perform their duties there. The times and places for holding their courts in the States of South Carolina and Georgia, &c., &c., were prescribed by laws of the United States before the rebellion. Those laws have not been abrogated by the force which has prevented the sessions from

being regularly held. The loss of several sessions, even for years, has not subverted the authority; and the judges may, if they will, without any enabling act of Congress, or any authority from the President, take their seats at any time and place heretofore assigned by law, and hold their courts. Nothing was necessary in order to enable them to do this, except the removal of the military rule which remained on the termination of the war; nor was that even essential, if the military authority did not see fit to interfere with the judicial functions.

There can be no question in relation to this authority of the courts of the United States to act forthwith in their several circuits, for that authority is in no way dependent on the State organization. The judicial authority of the United States acts directly upon the people, through the Constitution and laws of the United States. It is to be exercised within the limits of the States. But the active exercise of the functions of the States, as such, is not necessary to the exercise of the jurisdiction. The State must exist as a member of the Union in order to its exercise. If the State were to cease to be a member of the Union, the judicial authority of the United States courts would cease there. If by any change the State assumed a territorial character, then there should be provision for territorial courts. If the territory of the State was conquered, in such sense that its relations to the United States were changed thereby, then new legislation must be had before the courts of the United States could exercise authority there.

In order that the people of a State may participate in the legislative functions of the United States, it is necessary that the State should be organized. Disorganization which may result from war suspends such participation, because it is only through organization and the exercise of State authority, that senators can be elected by the legislature, and representatives chosen by the people.

But, I repeat, State organization, and the exercise of State authority, are in no way necessary in order to the full operation of the judicial authority of the United States within a State.

Moreover, the judicial right to act has been complete, within all the States, during the whole period of the war. The authority has been obstructed in its exercise, but it was not thereby lost or impaired. The obstructions are removed. What rea-

sons of policy, if any, may intervene to delay the holding of courts in the disorganized States, do not at this moment distinctly appear.

Now the fact that the judicial power has been, and now is, legally in full force in the seceded States, (if we please so to designate those which are not seceded States,) conclusively proves that the States have not lost their existence as members of the Union, either by rebellion, or State suicide, or conquest, or by any other process. And this shows that the *States* have not been in rebellion, as has been said. We speak of the rebel States, because the State authority appears to be arrayed against the Union; but the fact that the judiciary of the United States has at this moment full right and lawful authority to exercise its jurisdiction throughout the States in question, under laws passed before the acts of secession, and that such right, although obstructed, has existed during the whole of the war, shows that the rebellion was personal, and the offence that of individuals, not of States.

Again: the legislative authority of Congress extends over those States in the same manner that it did before the rebellion, and it has done so all the time, although, like the judicial, obstructed in its actual exercise by the force opposed to it.

The continued organization of the State is in no way requisite to the existence of the authority of Congress over it, and the people within it. If it were so, then Congress lost all authority by the success of the war, which left the States completely disorganized. There has been no time during the rebellion that Congress could not have passed any law, to have force and effect within any of these States, as States, which Congress could lawfully have passed prior to the rebellion. And any law so passed, although its actual operation might have been obstructed and defeated for years by force, would stand good, and might be acted on the moment the force was removed, unless it was one which affected some act to be done by the State. If the two houses of Congress should simply admit, as members of their respective bodies, the persons who have been elected as members, in the newly-organized States, no readmission of the States would be necessary. And no legislation is necessary to extend the laws of the United States over those States, whether such persons are admitted or not.

Again: the executive authority of the United States extends over those States, and has done so during the whole of the rebellion, impeded, obstructed, defeated, doubtless, in its actual exercise, for a time, but remaining legally operative, and needing only that the obstruction should be removed.

No act of Congress to enable the President to act again there has been found necessary. Postmasters are appointed, not by virtue of military authority, but by virtue of the laws of Congress which existed before the rebellion, and continued in force notwithstanding the rebellion. And other officers may be appointed, and other executive acts performed there, in like manner.

Now, the proposition that we may make a conquest of territory over which the Constitution and laws of the United States existed before the conquest, at the time of the conquest, and after the conquest, by the force of their passage before the war which gives rise to the conquest, — territory over which the legislative, executive and judicial authority of the United States was complete during all the time of the war; territory over which the United States might, at any moment during the war, exercise every right which they could lawfully exercise, by the Constitution, before the war or after the war, except upon the ground of revolution, — is a proposition that cannot stand in any well-reasoned view of the relations of the States to the United States before and since the termination of the war.

To-day the legislative, executive and judicial authority of the United States over those States, and the people of those States, under and by virtue of the Constitution of the United States, is as perfect and complete as the authority of the Constitution can make it. To-day there is no actual obstruction to the exercise of that authority in either of its branches. Is it not perfectly evident that this is all that the United States can ask, under the Constitution, except it be the performance of the duty resting upon the people of those States to participate in the legislation of the Union, by sending senators and representatives, and the duty of reorganizing the States, and providing, through that organization, for the welfare and happiness of the people, and the performance of all their duties as States in the Union. To all this there is no obstruction, except the difficulty

of taking the first step, and in most instances this step has been already taken.

As I have already indicated, in order to enable the States themselves to resume their functions, some new action, not prescribed, was to be taken at the close of the war, because the rebels, having usurped the State authority, and the usurpers having been overthrown, the States were left without a State administration; a case, which, not having been contemplated, was not provided for. It was only necessary, however, for this purpose, that some provision should be made for holding the primary meetings provided for in the several constitutions, and the rest follows of course, under the State laws.

The authority of the United States being complete, there is no legal impediment to the punishment of traitors. How far the constitutional provision securing trial by jury, which has heretofore been regarded as one of the greatest safeguards of liberty, may interpose an obstruction to convictions, in particular instances, through the refusal of juries to find the fact of treason, does not yet appear. However great it may be, it will not be wise to substitute a military despotism in its stead. It may yet be found useful for the protection of some of those who now seem to prefer military commissions.

But it is said, "Shall rebels be permitted to come back, and organize the State governments, and oppose the United States? They are as bitter rebels as ever."

"Traitors have no rights, except the right to be hanged," may do for a popular war-cry, but it will not bear examination, as a matter of constitutional law. Even treason does not disfranchise a man, except as he is punished for it, on conviction; and the accused has a right to be tried.

Who ever expected that the suppression of the rebellion by force, would operate, in a day, as the miraculous conversion of the rebels to a sound political faith? It would be a more marvellous conversion than the world ever witnessed. The Constitution does not search a man's heart, to determine whether he may vote. It operates, perhaps, upon his conscience, by requiring him to take an oath, if he is elected to an office. Even here, it asks not bonds or sureties.

Shall we punish all the traitors, or shall we follow the more recent examples of the civilized world, and punishing some,

remit the rest to the performance of their former duties, hoping that they will be all the better citizens for the bitter experience of the calamities which they have brought upon themselves and others.

But it is asked again, — “Shall those rebels be permitted to come back into the Union after they have shed so much of the best blood of the country?” That question it is readily seen does not, and cannot, arise, as a question of constitutional law. Whether it is designed to invoke vengeance for acts which were wholly unjustifiable, and which in some instances were undoubtedly horrible atrocities, for which those who committed them deserve the full penalty of the law; or whether it is introduced to sustain revolutionary measures; it has no place in a constitutional discussion. We mourn our honored dead. We shall not recall them to life again by taking vengeance on those through whose agency they have been slain, nor by a sacrifice of the Constitution.

But it is said, that we must have a guaranty, that no similar rebellion against the authority of the United States, shall ever occur hereafter. The folly of such a position needs no exponent. No such guaranty can possibly be given. Place the heel of military despotism upon the necks of the people of those States, and you have only the greater probability that they will eventually attempt to cast off the oppression. Exterminate the Southern people, and fill their places with Yankees, — emigrants from Massachusetts, if you please, — and you have only made assurance doubly sure, that if they deem themselves oppressed, you will have another rebellion, founded perhaps in a better reason than the last, and so much the more likely to be successful.

If you intend to guard against rebellion, in future, punish the leaders, so far as justice and policy dictate, and pardon the followers. Diffuse, as far as you may, just principles, and promote the prosperity even of rebels, no longer such, by all rightful measures.

Another consideration to be noted here is, that you cannot require any such guaranty, or force upon the States or the people any measures to secure it, except by revolutionary action.

.To have the full exercise of all the powers of the United

States, legislative, executive and judicial, within these States, and to have the States providing within their sphere for the welfare of their people, and complying with the requirements of the Constitution, is not only all that the United States can require, but all that they can have under the Constitution. All beyond this is revolutionary. We have the power, and may say what we will have in the way of revolution. But if we want revolution, let us say that we intend revolution, and not, by attempting to shield our unauthorized measures under the pretence of constitutional authority, destroy the vitality of the Constitution, making it the instrument to serve the purpose of any party in power, by forced or sophistical construction; for in that way it will become an engine of despotism, instead of the sheet-anchor of freedom.

The proclamation of emancipation was glorified as the constitutional charter of freedom to the slaves, — duly issued by constitutional authority, under the war power. Elaborate speeches of politicians, and more elaborate essays and sermons of reverend doctors of divinity, proved, as they thought, beyond all question, the constitutional right of the President to issue it; the main authority relied upon in the argument, being an ill-considered, general remark of John Quincy Adams, in a heated debate, that “by the laws of war, an invaded country has all its laws and municipal regulations swept by the board,” and that “when a country is invaded, and two hostile armies are met in martial array, the commanders of both armies have power to emancipate all the slaves in the invaded territory”; — the logical conclusion being, in the application of this remark of Mr. Adams, that President Lincoln, in the presidential chair at Washington, with his cabinet around him, could, after consulting “Whiting’s War Powers of Congress and of the President,” free all the slaves in the rebellious districts — by a proclamation!!! Two South American pronunciamientos have, I think, been cited, as having settled that the power existed *under the law of nations*. Indeed! It is very clear that they never settled anything else, on the subject of international law. Painting gave us the President and Cabinet in council upon the proclamation. The engraver’s art is to multiply the copies, and give immortality to “the war powers.” Jubilee meetings still



celebrate its anniversary. And now, the Chairman of the Committee of ways and means, the leader of the dominant party in the House of Representatives, tells us, that "*no thoughtful man has pretended that Lincoln's Proclamation, so noble in sentiment, liberated a single slave.*"

It is impossible that the Constitution should not receive detriment with such handling.

The President, as a condition of the removal of military rule, has required the States to abolish slavery, and they have done it. It is effective, because in any legal controversy, involving the freedom of the slave, the courts cannot go behind these amendments to the State constitutions, and inquire whether the people were, or were not, coerced into their adoption. For all legal purposes, the act of the people, in voting for these amendments, must be deemed and taken to be their voluntary act. But aside from legal investigations, we know well enough, in point of fact, that the people of these States were compelled to abolish slavery, as a condition of their being permitted to reorganize their State governments. And this is revolution, thus far. The authorities of the United States compelled the surrender of what has been known as a State power and a State right, since the Declaration of Independence, — for more than half a century an acknowledged State right.

The same frank leader in the House of Representatives says of this requirement of the President, "*That* is the command of a conqueror. *That* is Reconstruction, not Restoration. Reconstruction too," he adds, "by assuming the powers of Congress." But the powers of Congress, and the measures of Congress, which he advocates, are equally the powers of a conqueror, and measures of reconstruction.

Let me not be understood to say, that under the circumstances of the case, some measures of revolution were not justifiable. What I contend for is that all such measures should be baptized in their own proper name, and stand on their own merits, as such, and that the Constitution should not be perverted, by being made to cover all the measures to which a dominant party sees fit to resort, even to accomplish a good deed, still less those which are adopted to secure a party ascendancy.

The adoption of the amendment to the Constitution of the United States abolishing slavery, extinguished it where it still remained, without revolution.

But here again we have the fact, that some three to four millions of persons, lately slaves, are now free. It is alleged that the United States, having thus enforced their freedom, are now bound to provide for their welfare; that this includes protection against their former masters, the right to testify in the courts, to sit on juries, the right of suffrage, &c.

I have nothing to say against the emancipation itself, whether as a measure of revolution or otherwise, except that the gift of freedom to millions of persons before in servitude, has proved, and will still prove, a most fatal gift to great numbers of its recipients. I could have been better satisfied, if the boon could have been bestowed in a mode somewhat less deadly.

But if, having effected the greater portion of the emancipation by a measure of revolution, it is necessary to carry our revolutionary measures still further, let us meet the exigency fairly, and say that having through revolution subverted the rights of the States to hold slaves and regulate slavery, we have thereby incurred a duty which makes it necessary for us, by another revolutionary measure, to subvert certain other rights of the States to regulate the political rights of freemen, in matters which concern their relations to the States; and then we shall have the case stated in its true aspect, and can judge of it accordingly.

Certain it is that the right of suffrage, the right to be heard as a witness in the courts of justice, the right or the duty to sit as a juror, &c., &c., have been from the first, and are still, matters of State regulation.

Those who abandon the theory of conquest and suicide and loss of State rights, consequent upon the rebellion, admit the last, as well as the first part of this proposition.

But there seems to be a great reluctance to say "Revolution," and so the Constitution is subjected to a new process of construction, and a new discovery is made.

The Constitution, article 4th, section 4th, contains this provision, to wit:—

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against

invasion; and on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence."

The discovery is, that under the first clause of this section, the United States may require of the States in which the emancipation has taken place, to abolish all distinctions founded upon color, and give to the freedmen the right of suffrage and all other civil rights, because that is necessary in order that those States should possess the republican form of government which the United States is thus bound to guarantee to them; and that the states may be held in military grasp until all this is done, and the constitutional obligation on the part of the United States thus complied with.

I am not aware who is entitled to the credit of this discovery, made for the first time, as a matter of constitutional construction, more than three quarters of a century after the Constitution was adopted. But it is urged, with truth, that this last fact is not conclusive against the construction contended for, because it is only lately that people were put upon inquiry whether this is not the true construction of the clause. May not this be fairly regarded as an admission that it is only recently that such a construction has become necessary in order to effect certain purposes. Why were not people long since put upon this inquiry in reference to Illinois, where until recently no free negro or mulatto was permitted to come and settle without producing a certificate of his freedom, and without giving bond not to become a charge on any county in the State; and a negro, mulatto, or Indian, could not be a witness in any court in the State, in any case against a white person,—where a person having one fourth part negro blood was to be adjudged a mulatto,—and where, by the Constitution, the right of suffrage was confined to the white male inhabitants. Why was not the inquiry made also in relation to Connecticut and other States, where similar restrictions exist upon the right of suffrage? To say that there are but few persons in the free States upon whom such restrictions have operated, is dodging the question,—which is one of principle and not of numbers.

The "Address to the People of the United States," drawn up by the Committee appointed at a meeting of citizens in

Faneuil Hall, in July, 1865, seems to contain the germ of such a construction, rather than to state the proposition, even in its simplest form. And the conclusion appears to be, that it is the right and duty of the United States, to hold those States in the military grasp until the desirable end should be attained, without undertaking to specify upon what course of reasoning that conclusion is based. The Address, while it says that "it is our right and duty to secure whatever the public safety and the public faith require," admits that under the Constitution, most of these subjects of which it speaks are entirely matters of State jurisdiction. A few short extracts will show the general purport of it.

"Once withdraw the powers of war, and admit a State to its full functions, and the authority of the nation over these subjects is gone. It is a State function to determine who shall hold land, who shall testify in State courts, who shall be educated, and how; who shall labor, and how; and under what contracts or obligations, and how enforced; and who shall vote in national as well as State elections.

"Any restoration would be dangerous, which did not secure, beyond all reasonable peril, the abolition of slavery, actual freedom, just rights to the free, and within each State, 'a republican form of government.'

"We do not ask that the nation shall insist on an unconditional, universal suffrage. We admit that States determine for themselves the principles upon which they will act, in the restrictions and conditions they place upon suffrage. All the States make restrictions of age, sex, and residence, and often annex other conditions operating in substance equally upon all, and reasonably attainable by all. Those matters lie within the region of advice from neighbors, and not of national authority. We speak only to the point where the national authority comes in. We cannot require the rebel States, if we treat them as States, to adopt a system, for the sole reason that we think it right. Of that, each State, acting as a State, must be the judge. But in the situation in which the rebel States now are, the nation can insist upon what is necessary to public safety and peace.

"The end the nation has in view is the same as that for which the war was accepted and prosecuted, — the restoration of the States to their legitimate relations with the republic. The condition of things calls for no limitations of times or methods. By whatever course of reasoning it may be reached, upon whatever doctrine of public law it may rest; however long may be the interval of waiting, and whatever may be the process resorted to, the friends and enemies of the

republic should alike understand that it has the powers, and will use the means, to insure a final restoration of the States, with constitutions which are republican, and with provisions that shall secure the public safety and the public faith."

It does not require great sagacity to perceive to what all this tends, but the discovery that it could all be done under the clause of the Constitution by which the United States guarantees to each State a republican form of government, had not then been fully made.

A supplement to the "Daily Advertiser," in December following, contains what may perhaps be regarded as a supplement to the Faneuil Hall address. It is an attempt to sustain the conclusions of that address by an explicit reference to the clause of the Constitution under consideration.

One object of the paper appears to be to vindicate the right of Congress to do whatever may be needful; another object to show that the clause under consideration may be made by Congress the ground for holding the Southern States out of the Union, until the States shall satisfy Congress that there is no imminent danger that those who have always been free will oppress those who have recently become free, in a manner and to an extent inconsistent with republicanism, of which Congress must judge. What guaranty against such oppression is necessary in order to satisfy Congress, is not said. But referring to the guaranty clause, it is remarked: —

"It is a covenant of the United States. It must be the duty of the United States to do what it solemnly promises to do. It can do this only by and through Congress. It is therefore a duty of Congress to discharge this duty of the United States."

The writer then supposes, in order to illustrate his meaning, that —

"'AN ACT to guarantee to every State a republican form of government' should be passed by Congress, providing that 'everything in the Constitution or laws of any State, which deprives as many as one fourth part of the citizens of that State, as ascertained by the last preceding census, of rights or privileges of property, of education, of standing before the courts as parties or witnesses, or of suffrage, which rights or privileges are possessed by the other part of said citizens, which deprivation is founded upon a difference of race or

color between those who possess said rights and privileges and those who are deprived of them, is, and the same is hereby made and declared to be, null and of no force or effect."

He argues in favor of the constitutional right of Congress to pass such an act. And he supposes Congress to say to the States, —

"Be you wise or unwise in your provisions about suffrage, we have nothing to do with you *unless you become non-republican*. Then we must interfere; then we must prevent or annul whatever is thus non-republican. For it is a direct violation of a most distinct guaranty of the United States, of a guaranty which guards the very foundation of our government, which the United States cannot carry into effect except by Congress, and which Congress cannot carry into effect except by preventing or annulling everything that is inconsistent with republicanism. And that it is our duty to do."

The writer adds, —

"I cannot but regard the view that the guaranty clause gives to Congress mainly if not solely a negative and restraining power, as of some importance. And it seems to dispose of the objection founded upon the earlier political history of our country. The framers of the Constitution made no rule for all the States as to the right of suffrage, because this right differed exceedingly in the different States; but all were republican, and this was enough. The Constitution recognized slavery, and therefore the existence of a large body of slaves called for no exercise of this power. But if, in the judgment of Congress, there is imminent danger in any State where this transformation has taken place, that they who have always been free will oppress those who have recently become free, in a manner or to an extent inconsistent with republicanism, here, for the first time, is an occasion for the exercise of this power."

Here is a distinct admission that at the time of the adoption of the Constitution the States were all republican. But the idea that a State holding twenty-five per cent. of its population in abject slavery, without any of the rights of manhood whatever, is a republican State, within the meaning of the Constitution; and that the same State, by emancipating this twenty-five per cent., becomes anti-republican, within the meaning of the same Constitution, if it does not at once confer upon that population the right of suffrage, and all rights usually con-

ceded to citizens, because in such case Congress may please to apprehend that there may be oppression of that class, can have no sound foundation. If it can be supposed that there may be a greater oppression of a class than that found in the state of slavery, how many eloquent speeches have been made in vain.

The writer on criminal law before referred to, contends that the States in question have no government, and that the United States may therefore act under this clause. He says, "the effect of the act of secession was to place the seceded States under liability to be re-clothed by the United States according to the terms of the Constitution."

He adds, that whether his views are correct or not *as regards the effect of this particular provision*, yet it is the view which has all along been entertained by what is deemed the sound and conservative part of our loyal community, *as deducible in some way from the Constitution*. That shows the *animus* precisely. The thing must be done, and so the right to do it is to be deduced in some way from the Constitution.

But an opinion carrying greater weight than this, is that of an eminent jurist, for a long period Chief Justice of Vermont, who in that office, and as a text-writer, has obtained deserved celebrity, and who in a letter to a member of Congress assumes to treat the subject of restoration, in what he intends as a purely legal and logical argument, — in the first part of which he controverts with great success several of the illogical arguments of the political stump speakers.

Of negro suffrage he says, —

"We do not comprehend how the national government have anything to do with that question. The national Constitution formally recognizes that as an inherent and unsundered State right. . . . The elective franchise, and the right of defining it, is one of the fundamental powers of all free government, — one which cannot be taken away, except by the clearest concession, without the utter annihilation of the very first principles of national liberty. And he must be a bold man who would assume to claim that the States have ever ceded this to the nation. . . .

"If, then, there is any just and proper mode of securing to the blacks that agency and voice in the government which seems so desirable to their proper protection in their present defenceless position, we must look beyond the general law of the elective franchise

in the State and municipal elections, or even as to national elections, since this depends exclusively upon State authority. And in attempting to find some proper way of escape from the embarrassing dilemma, it has seemed to us that it may be done through the organic law of the State, and the obligation imposed upon the nation to guarantee to each of the States a republican form of government.

"This provision of the national Constitution must imply the power in the nation of judging what is a republican form of government. . . . Unless this provision carries with it the power of judging and determining for themselves what shall be a republican form of government, it would become both useless and impracticable. We must then, conclude that there is hereby reserved to the nation the right of deciding when the States have departed from the republican form of government, and to demand a return, in some way, to that form of government. . . .

"The nation may, therefore, not only properly insist that slavery shall be abolished by the States, but that they shall give reasonable assurance and guaranty against its reestablishment. The least which this implies is, that this large accession of free and native population which had in its former dependent state been represented through their superiors, the masters, but which in its present new state is not represented in any form or mode in the organic law of the several States, should in some way have a fair and free opportunity of being heard, in person, or by their representatives, in the creation of a new organic law, which may be said fairly and truly to represent the whole native and naturalized population of the State. This accession of free native population is not by the ordinary process of growth or accretion, but may be properly said to have been brought about by avulsion or sudden accession. And as it is clearly entitled to be represented in some form in the creation of the organic law of the State, and as it is clearly not so represented in its newly-acquired *status*, it seems not improper for the national executive and legislative authority to require of the several States where the rebellion prevailed, and where slavery has been abolished in consequence, that the States shall form new constitutions, giving all the native and naturalized inhabitants a voice therein. This could only be done by having the convention forming the constitution composed of delegates chosen by the vote of the whole people, and then submitted for its adoption to the vote of the whole people. This the national authority may clearly demand as the very least which will produce a republican form of government, — one which they will feel justified in regarding as fully coming within the view of the requirements of the National Constitution." . . . .



This conclusion is certainly not a logical sequence from the positions of the writer which precede it.

In considering this subject we may start with the proposition, that the war has given no new meaning to the clause of the Constitution requiring the United States to guarantee to every State in the Union a republican form of government. The United States have no greater power, by means of this clause, than they had on the first adoption of the Constitution. The true construction of it as it stood on its adoption, is its true interpretation at the present time. What it was then, it is now. What it meant then, it means now. What might have then been done under it, may be done now ; and what could not then have been rightly and lawfully done under it, if attempted to be done now, will be an attempt at usurpation or revolution.

The true construction may or may not be presented in a clearer light by the logic of subsequent events. But that logic cannot change the provision so as to make it what it was not when it was adopted.

We come, then, to the inquiry, what is the true meaning and construction of this provision as it existed on the adoption of the Constitution, and as it exists at the present time ?

In this, as I have already said in general, we may best determine the true construction of the Constitution by a study of its history. This, fortunately, is, in the main, open to us. Its formation was not so remote that the necessities which led to it, the purposes of its framers, the discussions respecting its different provisions, the difficulties it encountered, and the particular objections to its adoption, cannot be substantially traced at the present day. And it is to these that we are to resort, in most instances, where doubts exist respecting its meaning. Words change, views change, party purposes change, arguments change. The facts which have happened may be misrepresented, but cannot change. When we have the certainty of their existence, they are safe guides from which to derive the interpretation of the language which was used in connection with them. It is a familiar principle of the law, that a declaration accompanying an act, and tending to elucidate it, may be given in evidence to show the true character of the act. In like manner the circumstances under which a declaration is made, may serve to interpret the language, and give a character to the declaration.

But an argument founded upon the general circumstances attending the origin and adoption of the Constitution, may be superfluous in this case, because the reason for the incorporation of the provision in question into the Constitution, and its true interpretation at that day, is made perfectly clear, by a reference to the "Madison Papers," and to the "Federalist." We can trace this provision from its inception, in a somewhat different form, in the mind of Mr. Madison, as set forth in a letter to Governor Randolph; through all the stages by means of which it assumed its present shape, having had its origin in an idea that the Constitution ought to contain a provision expressly guaranteeing the tranquillity of the States against internal as well as external dangers. It appears that the resolution at first introduced into the convention was, that "a republican government and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State;" that it was altered in the committee of the whole, so as to read, that "a republican constitution, and its existing laws, ought to be guaranteed to each State by the United States;" that when this proposition came up for consideration an objection was made to guaranteeing the existing laws of the several States, a member saying that he "should be very unwilling that such laws as exist in Rhode Island should be guaranteed," — to which it was answered, "the object is merely to secure the States against dangerous commotions, insurrections, and rebellions;" that Mr. Madison moved to substitute, "that the constitutional authority of the States shall be guaranteed to them, respectively, against domestic as well as foreign violence;" whereupon a member said, he "was afraid of perpetuating the existing constitutions of the States,— that of Georgia was a very bad one, and he hoped would be revised and amended;" that Mr. Randolph moved to add, as an amendment to Mr. Madison's motion, "and that no State be permitted to form any other than a republican government;" whereupon "Mr. Wilson moved, *as a better expression of the idea*, that a republican form of government shall be guaranteed to each State, and that each State shall be protected against foreign and domestic violence." This seeming to be well received, Mr. Madison and Mr. Randolph withdrew their propositions, and on the question for agreeing to Mr. Wilson's motion, it passed *nem con.*"

We have in this brief history the origin of this provision ; its shape when introduced into the convention, embracing a guaranty of the territory of each State ; its change to a guaranty of the Constitution, and the existing laws of each State ; the objections to it in that form ; the motions to amend, until "a better expression of the idea" was reached in the adoption of a proposition, the first clause of which was substantially the clause in question as it now stands in the Constitution. And it is perfectly evident that the expression of the idea thus reached, had in it no element whatever authorizing, or tending to authorize, the construction which has recently been attempted to be put upon this section.

The change by which the words, "that a republican form of government shall be guaranteed to each State," were made to read as at present, "the United States shall guarantee to every State in this Union a republican form of government," which in no manner affects the meaning or effect of the clause, arose from objections which were afterward made to the latter part of the amendment, adopted on motion of Mr. Wilson. These objections were founded upon a fear that a provision, "that each State shall be protected against foreign and domestic violence," unless some limitation should be placed on the general language of it, might give to the United States a dangerous power of interference in the internal concerns of the States ; and to guard against this, it was altered, through several amendments, until it was limited as it stands at present in the Constitution. In the forty-third number of the "Federalist," Mr. Madison, commenting on this section, says :—

"In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such an union may be, the greater interest have the members in the political institutions of each other ; and the greater right to insist, that the forms of government under which the compact was entered into, should be *substantially* maintained. . . .

"It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the

general government should not be needed, the provision for such an event will be harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no further than to a *guaranty* of a republican form of government, which supposes a preëxisting government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms they have a right to do so, and to claim the Federal guaranty for the latter. The only restriction imposed on them is, that they shall not change republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered as grievous."

It is almost wonderful how fully and completely this account of the origin, progress, and adoption, of this guaranty of a republican form of government, refutes and destroys all the glosses which have lately been attempted to be put upon it, as an authority for the United States to interfere in the internal concerns of the States.

There are other considerations showing that it had not, and could not have had, any regard to State laws with respect to race, color, class, suffrage, testimony, or anything of that character.

The language of the clause in question is that of *obligation* on the part of the United States. Slavery then existed in nearly every State. In but very few of them could free negroes vote; in many they could not testify in courts in a controversy in which a white man was a party; and in others there was an exclusion of large numbers of the people from the right of suffrage, confining it, in some instances, to freeholders alone.

If the exclusion of large numbers of the inhabitants from the right of suffrage, could prove that the State making the exclusion has not a republican form of government, then not only were several of the States not republican in their forms of government when the Constitution was adopted, and the guaranty thus broken immediately after it was made, but the framers of the Constitution knew that it would be thus broken, for they knew

that no change in the forms of the State governments was contemplated. This is charging upon the framers of the Constitution not merely foolishness in adopting the provision, but criminal negligence in making no attempt to enforce it. That generation passed away and another followed it, and still the provision remained a dead letter. It was reserved to the "third and fourth generation" to make a new discovery respecting the meaning of it.

It has been said that mere neglect to enforce the provision cannot prove that the new construction is not the true one. But the case of Rhode Island, where the controversy respecting the exclusion of all but freeholders from the right of suffrage, terminated in what has been denominated the "Dorr Rebellion," called for a careful consideration of the right and duty of the United States to interfere for any such reason.

Again : if the exclusion of large numbers of people from the right of suffrage, &c., proves that a government is not republican, then the United States is not, and never has been a republican government ; for the convention which framed the Constitution, with a full knowledge of these exclusions in the different States, deliberately adopted the State rule as the basis of suffrage for the election of representatives in the Congress of the United States, and provided that the senators of the United States should be elected by the legislatures of the several States, the members of those legislatures having of course been elected where such exclusion existed.

Furthermore, we have seen that it is admitted that the States were all republican on the adoption of the Constitution. If any of them are not so now, it is because of recent changes. But the only change which is suggested, as affecting this question, is that which regards the freedmen, and which has arisen from the emancipation of the slaves.

This change was effected by the United States. Whether it was produced by the proclamation of President Lincoln, or by the operations of the war, or by the requirement to alter the State constitutions, or by the amendment of the Constitution of the United States, it has been accomplished by the United States.

Now the argument and conclusion are irresistible, that if this change has so affected any State that its form of government is

not thereby republican, then the United States have made the form of government anti-republican, and have thereby violated their guaranty; and the remedy in that case would be to retrace their steps, and thus place the State back in the situation of a State with a republican form of government.

Slavery was not the cause that the form of government is not republican, within the meaning of the terms "republican form of government," as used in the Constitution. That is admitted, and must be admitted. Upon the argument which we have been considering, it is the emancipation which makes the form of government anti-republican, because the emancipation frees the slaves without giving them a right to vote.

But the United States cannot say we have deprived you of a republican form of government, and now you must make another Constitution, such as we shall dictate, that we may thereby perform our constitutional obligation to guarantee to you a republican form of government.

If these principles are correct, there is no constitutional power in Congress to admit, or to deny admission to, these disorganized States.

Say that the rebellion embraced a large majority of the population of those States, and that the rebellious spirit exists still, on the part of numbers, so as to require the presence of a military force there to secure the keeping of the peace. That does not prove that the people who are no longer rebels have lost their right to their State governments, or to their representation in Congress. Any military occupation, beyond what is necessary for the preservation of the peace, would be unwise, and any subjection to martial law would be usurpation. It will not do to say that the war is not over, after the rebels have laid down their arms and submitted themselves to the law, and there is no force attempting to make war, or to resist the authority of the United States.

And in like manner, any attempt by either House of Congress, to hold those States out of the Union, under the pretext that each House of Congress, being the judge of the election of its own members, must judge whether a State claiming to be one of the United States, is in the Union or not, and may determine that these States are not in the Union, until it shall please the members of Congress to be satisfied of the loyalty

of the people there, is unconstitutional also. The power to judge of elections is not given to be exercised for any such purpose.

Doubtless if Cuba, assuming to be a State in the Union, should elect senators and representatives, each House of Congress might refuse to admit them as members, upon the ground that Cuba was not a State in the Union, and so not entitled to be represented. She never was in the Union. Of that fact each House must take notice. Such refusal to admit, would not be in effect turning her out of the Union. The case is altogether different where a State has been regularly in the Union, could not take herself out, has not been expelled, and still claims her privileges as a State. It would be wholly unconstitutional for either House of Congress, upon the question of the admission of members from Connecticut, to decide that that State had forfeited her rights as a State, because she had not conformed to the progressive spirit of the age, and granted the right of suffrage to her negro population; or to determine that her refusal to permit the negroes to vote, showed that she had not a republican form of government, and that she could not be represented, until *such form of government should be guaranteed to her, by an Act of Congress extending the right of suffrage in that State.*

The two Houses of Congress may judge of the qualifications of persons elected, as they might have done prior to the rebellion, judging fairly in that respect, according to law, as a court tries a case upon its merits, but not upon extraneous considerations. For the qualifications of members we must look to the Constitution and laws, and not to partisan feeling, or mere party dogmas.

We shall do ourselves less than justice if we fear that the admission of the Southern members will endanger the Union. We shall do ourselves and them a wrong, if we refuse them admission to their seats, because we fear that this will endanger a party ascendancy.

So long as our government is one of principle, it will stand. When it becomes corrupt, "a republican form of government" will not save us.

## APPENDIX.

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### Note A. See p. 14.

It was ordered by the Court of the Colony of Connecticut, ("according to the conclusions of the Commissioners of the United Colonies of New Haven, Anno 1646,") [? 1643] that in case of wilful wrongs and hostile practices of the Indians against the English, the "magistrates may, at the charge of the plaintiff, seize and bring away any of that plantation of Indians that shall entertain, protect, or rescue the offender;" . . . "only women and children to be sparingly seized, unless known to be some way guilty;" and if satisfaction was denied, "that then the magistrates deliver up the Indians seized to the parties endamaged, either to serve or to be otherwise disposed of, in the way of merchandise, as the case will justly bear." — Laws of Connecticut Colony, 32, 33.

If servants run away from their masters it was lawful for the next assistant or commissioner, or if none, then "the constable and two of the chiefest inhabitants, to press men and boats, or pinnaces, (if occasion be,) at the public charge, to pursue and bring them back by force." — *Ib.* 47.

The Colony of Massachusetts, while it bore its testimony against man-stealing, and ordered the negro interpreters and others unlawfully seized to be sent back to Guinea, early recognized the right to enslave "such lawful captives, taken in just wars, as willingly sell themselves, or are sold to us." And a province law, in 1718, made the master of a vessel who should transport beyond seas any *bought* or hired *servant* or apprentice, liable to a fine and to damages to the master or owner of such transported person.

Encouragement to escape, or protection to fugitive slaves or servants, was not the fashion of that day in New England.

How far the "covenant with death and hell," found in the Constitution of the United States, had its prototype in these earlier proceedings in New England, I leave for the curious to inquire.

### Note B. See p. 20.

THERE has been an attempt to maintain that the States were never sovereign, but that a part of the sovereignty always resided in the Congress of the United States, or in the whole people of the United States, as an entire body. The history of the Colonies—of the adoption of the Declaration of Independence, and of the subsequent formation of the Confederation, through



the articles framed in 1777, and signed by delegates from most of the States in 1778, others giving in their adhesion from that time till 1781 — proves, that any theory of sovereignty in the United States as a whole, except by and through the delegation of power from the States, or the people of the several States, after they became independent, and so sovereign States, cannot stand the test of examination.

The several colonies were distinct, neither having any power over the other. Their several dependence upon the crown of Great Britain had no effect to make them one people. The confederation of the New England colonies, in 1643, was but temporary. An attempt at a more extensive confederation failed. It was not until 1774 that they had any united action, and it was then merely by mutual consent, for the time being, for the common defence. The congress of delegates, in the first instance, had no powers of sovereignty whatever. The common danger and the common interest induced the people of the several colonies to act together to promote the interest of each and of all. The people of the several colonies authorized their delegates to unite in a common Declaration of Independence. All the authority to make this Declaration was derived from the action of the people of each colony, acting separately. And the Declaration itself, pursuing the authority given to make it, is that the former colonial organizations are now, of right, free and independent States; that, as such, they have full power to levy war, conclude peace, and do all other acts and things which independent States may of right do. The Articles of confederation, which were not finally agreed to in Congress until the expiration of sixteen months afterwards, and which were not signed until more than two years after the Declaration, special authority being given by the several States therefor, declare, in the second article above quoted in the text, that each State retains its sovereignty, &c. Where had the sovereignty resided from the time of the Declaration up to the time of the adoption of the Articles of confederation. If Congress, in the intermediate time, can be said to have exercised any sovereign power, it was because the several States, through their delegates, from time to time voluntarily united in the act. That is to say, each State exercised a portion of its sovereign power, in connection with the others, exercising each a portion of sovereign power.

Note C. See p. 55.

IN 1855, his Excellency the Governor, in his Address to the members of the Legislature, remarked: —

“While we acknowledge our fealty to the Constitution and the laws, the oft-repeated cry of disunion heralds no real danger to our ears. While we honestly concede the common duties evoked by the articles of confederation, we will preserve inviolate the State rights retained for each sovereign member of that confederacy. With fraternal feelings to all her sister States, and filial devotion to their common parent, yet with acknowledged rights, and a determination that they be maintained, *there stands Massachusetts.*

“Of those rights, the two cardinal ones are the *habeas corpus* and the

trial by jury. It is submitted to your deliberations, whether additional legislation is required to secure either of these to our fellow citizens. Scrupulously avoid such action as asserts or looks to the maintenance of any rights not clearly and constitutionally ours, *but weave every safeguard you justly may around those primal birthrights, older than our national birthday, and dear as its continued existence.*"

The joint standing committee on Federal Relations, to whom this part of the Address was referred, incorporated into their report divers extracts from the Constitution of Massachusetts, asserting the rights and liberties of the people, with extracts from the amendments to the Constitution of the United States relative to security against unreasonable searches and seizures, and to the right of trial by jury, and the privilege of the writ of habeas corpus; and then proceeded to say:—

"From these explicit declarations in our fundamental constitutions, your Committee draw the inference that the framers of our government, both State and National, intended to protect alike the liberties of all their citizens, the weak as well as the powerful, the poor as well as the rich. No distinction of class, or color, or race is made. On the contrary, they throw the broadegis of constitutional protection over all.

"Massachusetts stands second to no State in this Union in loyalty to the provisions of the Constitution of the United States. But when she is asked to violate the fundamental provisions of *that* Constitution as well as her own *she unhesitatingly throws herself back on her rights as an independent State. She cannot forget that she had an independent existence and a constitution before the Union was formed.* Her constitution secured to every one of her citizens the right of *trial by jury*, and the privilege and benefit of the writ of *habeas corpus*, whenever their liberty was at stake.

"*These essential elements of independence she has never bartered away. She will not suffer them to be wrested from her by any power on earth.*"

Presidential proclamations instituting martial law, and suspending the *habeas corpus* throughout the whole country had not then been issued; nor had Whiting's "War Powers of Congress and of the President" then been written. When these things did come, no class of persons submitted more tamely to the suppression of the *trial by jury*, and of the writ of *habeas corpus*, than that class which in 1855 so unhesitatingly threw Massachusetts back on her rights as an independent State; and asserted so valiantly that she would never suffer them to be wrested from her by any power on earth.









1. The first part of the document is a list of names and titles, including the names of the authors and the titles of the works. This list is organized in a table format with columns for the author's name, the title of the work, and the year of publication.

*Ezra Abbot is,  
with respects of  
J. Parker*

**THE FIRST CHARTER**  
**AND**  
**THE EARLY RELIGIOUS LEGISLATION**  
**OF MASSACHUSETTS.**

-----  
**By JOEL PARKER.**





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# THE FIRST CHARTER

AND

## THE EARLY RELIGIOUS LEGISLATION OF MASSACHUSETTS.

### A LECTURE

IN A

COURSE ON THE EARLY HISTORY OF MASSACHUSETTS,  
BY MEMBERS OF THE MASSACHUSETTS  
HISTORICAL SOCIETY,

At the Lowell Institute, Boston,

DELIVERED FEB. 9, 1869.

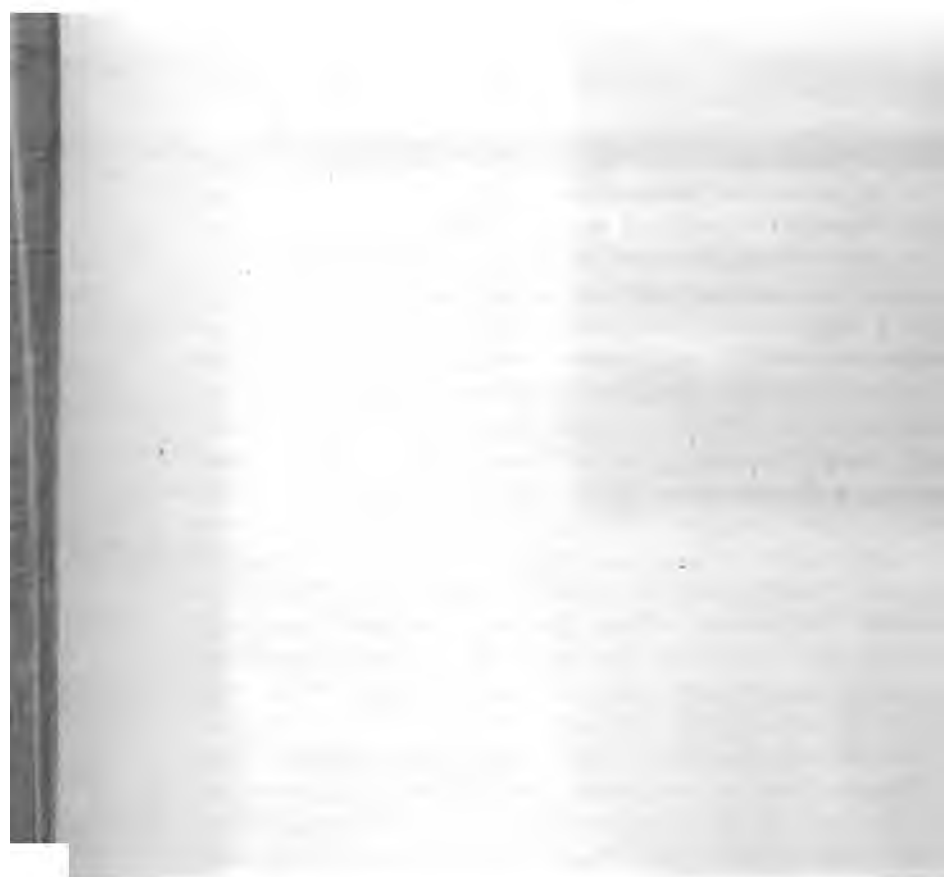
BY JOEL PARKER.

BOSTON:

PRESS OF JOHN WILSON AND SON.

1869.

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THE FIRST CHARTER  
AND  
THE EARLY RELIGIOUS LEGISLATION  
OF MASSACHUSETTS.

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IT has been regarded as a subject of complacency, that we know our origin, and can trace our history; that while other communities seek their early history in the mists of conjecture, or the myths of tradition, we can trace our own, in that documentary evidence which gives the greatest degree of certainty.

To a considerable extent, this is true. And yet there are particulars, essential to a right understanding of the principles upon which the original settlement of Massachusetts was made, respecting which there has been, and now is, such a diversity and discrepancy of opinion, after all the discussions of two hundred years, and after the labors of the Massachusetts Historical Society, for three quarters of a century, in collecting documents in regard to the subject, that the Ends and Aims of the first settlers of Massachusetts furnish the leading topic of the present course of lectures, in the hope that the errors which have prevailed on that subject may be corrected, and the purposes and objects of the founders of the Commonwealth may be more clearly and generally understood.

It is not surprising that there should be misconception upon this subject, when it is considered that the materials of the history of that time are widely dispersed, and often contradictory; malice manufacturing misrepresentations, prejudice engendering error, and mistake and carelessness causing fact and fiction to be so intermingled, that it is not seldom that the discovery of truth is a laborious task.

How many persons there are in the community, who, at this day, suppose that the celebrated so-called "Blue Laws of Con-

necticut" are the veritable legislation of the Puritan Colony there! The fact that one of them purports to provide, that "No one shall run on the Sabbath day, or walk in his garden or elsewhere, except reverently to and from meeting;" and another that "No woman shall kiss her child on the Sabbath, or on a fasting day," — might lead to a doubt;<sup>1</sup> but all this is deemed consistent with the spirit of the time, enforcing a strict observance of that holy day.

How few persons know that many of these "Blue Laws" are but the jokes of the wits and humorists of a subsequent age, for the purpose of sport and ridicule, having no enduring existence until Dr. Samuel Peters collecting, and probably adding to them, inserted, in what purported to be "A General History of Connecticut," a sketch, as he said, of laws made by the independent Dominion of New Haven, denominated "Blue Laws" by the neighboring colonies, and never suffered to be printed!<sup>2</sup> The whole work has been shown to be so untruthful that the appearance of these so-called "Blue Laws" there, is of itself *prima facie* evidence that they are fictitious.<sup>3</sup>

If we consider what a vast mass of contradictory material has accumulated within the last decade, to perplex the future historian of the late war, we shall cease to wonder that much may be done, even at the present day, by a diligent student of history, to elucidate the ends and aims of the Puritan Fathers of 1630.

It is because of the dispersion of material, and of the contradictory opinions which have been entertained respecting the rights, objects, and purposes of the founders of the Commonwealth, that I have deemed it not only a duty, but a pleasure, to answer the call made upon me to add a small contribution, such as it may be, to the present attempt of the Historical Society to illustrate the early history of Massachusetts.

The subject assigned to me is "the Religious Legislation of Massachusetts," — involving, of course, the inquiry how far any

<sup>1</sup> Another may furnish Congress with a model of brevity, in making up an "omnibus bill," near the close of a session: "No one shall read Common Prayer, keep Christmas or Saints days, make mince pies, dance, play cards, or play on any instrument of music, except the drum, trumpet, and jews-harp."

<sup>2</sup> See Gen. Hist. Conn. 63.

<sup>3</sup> See Prof. Kingsley's Hist. Discourse at New Haven, 1838. pp. 35, 50, 83, 104.

such legislation was lawful under the original charter,—and this, in turn, depending upon the question, to what extent the grantees had any right of legislation, properly so called, by the provisions of that instrument.

Upon this question the opinions have been much at variance, according as the charter has been regarded as instituting a corporation for trading purposes, or as the constitution and foundation of a government. That the grantees who settled here regarded it as the latter, and acted upon that construction, is apparent from their action at the outset, and throughout. But those opposed to them, contended at the time, that the former was its true intent and meaning, and historians have perpetuated that opinion. Minot, in his *History of Massachusetts*, says,—

“This charter, from the omissions of several powers necessary to the future situation of the Colony, shows us how inadequate the ideas of the parties were to the important consequences which were about to follow from such an act. The Governor, with the assistants and freemen of the company, it is true, were empowered to make all laws, not repugnant to those of England; but the power of imposing fines, mulcts, imprisonment, or other lawful correction, is expressly given according to the course of other corporations in the realm; and the general circumstances of the settlement, and the practice of the times, can leave us no doubt that this body-politic was viewed rather as a trading company residing within the kingdom, than, what it very soon became, a foreign government exercising all the essentials of sovereignty over its subjects.”<sup>1</sup>

He proceeds to speak of divers laws as having been made by the grantees, of their own motion and without any authority under the charter, and, after referring to the force of habits and prejudices, adds,—

“But such was the force of these habits and prejudices, and so prone are mankind to place unlimited confidence in their government, when unprovoked by the usurpation and abuse of power, that the people of Massachusetts may be said to have submitted to a system of laws, by which the freedom of action was abridged, and to have voluntarily yoked themselves to an ecclesiastical authority, by which the rights of conscience lost, for a time, the very principles that their emigration had avowed.”

Bancroft, who aspires to be the historian of the United States, writes,—

<sup>1</sup> See Minot, p. 19.

"The charter, which bears the signature of Charles I.,<sup>1</sup> and which was cherished for more than half a century as the most precious boon, established a corporation, like other corporations within the realm. The associates were constituted a body-politic by the name of the Governor and Company of the Massachusetts Bay in New England. The administration of its affairs was intrusted to a governor, deputy, and eighteen assistants, who were to be annually elected by the stockholders or members of the corporation. Four times a year, or oftener if desired, a general assembly of the freemen was to be held; and to these assemblies, which were invested with the necessary powers of legislation, inquest, and superintendence, the most important affairs were referred. No provision required the assent of the King to render the acts of the body valid; in his eye it was but a trading corporation, not a civil government: its doings were esteemed as indifferent as those of any guild or company in England; and if powers of jurisdiction in America were conceded, it was only from the nature of the business in which the stockholders were to engage."—"The charter designedly granted great facilities for colonization. It allowed the company to transport to its American territory any persons, whether English or foreigners, who would go willingly, would become lieges of the English king, and were not restrained by especial name.' It empowered, but it did not require the Governor to administer the oaths of supremacy and allegiance; yet the charter, according to the strict rules of legal interpretation, was far from conceding to the patentees the privilege of freedom of worship. Not a single line alludes to such a purpose; nor can it be implied by a reasonable construction from any clause."

He says further,— "The political condition of the colonists was not deemed by King Charles a subject worthy of his consideration. Full legislative and executive authority was conferred not on the emigrants, but on the company, of which the emigrants could not be active members, so long as the charter of the corporation remained in England. The associates in London were to establish ordinances, to settle forms of government, to name all necessary officers, to prescribe their duties, and to establish a criminal code. Massachusetts was not erected into a province, to be governed by laws of its own enactment; it was reserved for the corporation to decide what degree of civil rights its colonists should enjoy."

Again,— "The charter on which the freemen of Massachusetts succeeded in erecting a system of independent representative liberty, did not secure

<sup>1</sup> This, by the way, is a mistake in the outset. Charles Caesar, the Master in Chancery, before whom Governor Child took the oath of office, and whose name is appended to a certificate of that fact, at the bottom of the charter, was not Charles I.

to them a single privilege of self-government; but left them, as the Virginians had been left, without one valuable franchise, at the mercy of a corporation within the realm. This was so evident, that some of those who had already emigrated, clamored that they were become slaves.<sup>1</sup>

"It was equally the right of the corporation to establish the terms on which new members should be admitted to its freedom. Its numbers could be enlarged or changed only by its own consent.

"It was perhaps implied, though it was not expressly required, that the affairs of the company should be administered in England; yet the place for holding the courts was not specially appointed. What if the corporation should vote the emigrants to be freemen, and call a meeting beyond the Atlantic? What if the Governor, deputy, assistants, and freemen should themselves emigrate, and thus break down the distinction between the colony and the corporation?<sup>2</sup> The history of Massachusetts is the counterpart to that of Virginia: the latter obtained its greatest liberty by the abrogation of the charter of its company; the former by a transfer of its charter, and a daring construction of its powers by the successors of the original patentees."<sup>3</sup>

Now I may remark that it is quite possible Charles I. was not very careful to scrutinize the effect of the powers which he assumed to confer by the charter.

The lands granted (with a vast extent of territory besides, claimed by the Crown) were, notwithstanding the glowing accounts of some navigators respecting the fisheries, deemed of such small importance that they came very near falling entirely under the jurisdiction of other governments, from the mere neglect of the English Government to take possession; and so far as any direct independent action of the Crown was concerned, such would have been their fate. The patent to the Great Council of Plymouth, procured by individuals, probably saved them as a British possession.

And along with this supposition of a lack of value in the territory, King Charles could not have been ignorant of the general character, political and religious, of the proposed emigrants, and might well have considered that it was quite immaterial what

<sup>1</sup> These were the "old planters," — squatters, before the charter was granted.

<sup>2</sup> If they might do so, it would appear that the charter did secure to them some privileges of self-government, and that they were not necessarily at the mercy of a corporation within the realm.

<sup>3</sup> See Bancroft, vol. i. pp. 342-345.



powers were given to the grantees, to be exercised on the other side of the Atlantic, if thereby England would be rid of a class of people imbued with notions of republican freedom, and likely to be very troublesome as nonconformists, if they remained there.

If he could have cleared his kingdom of many more of a similar character, by a like process, he would have saved his crown and his life.

On the other hand, it is possible that the grantees were not fully aware of the extent of the powers conferred by the charter as they subsequently construed its provisions; but this admits of grave doubt. We may safely infer that the original draft was made by counsel employed by the applicants, and submitted to the crown lawyers for examination. It is not to be supposed that the crown officers would undertake the duty of preparing a document which had so much of a private character attached to it; and as it bears upon its face evidence that it was very carefully drawn up, apparently, so as to confer power without giving offence, we can hardly make a presumption that none of the grantees understood its full scope and effect. It is quite clear, however, that they did not anticipate such an influx of emigration that the very success of their experiment, so far as population was concerned, should have been its overthrow in some of its most important religious aspects.

But the question is not so much what the King, or other persons, may have supposed respecting the subject, as what provisions were contained in the charter.

Whatever rights the charter purported to grant, vested lawfully in the grantees.

The title to unoccupied lands belonging to Great Britain, whether acquired by conquest or discovery, was vested in the Crown. The right to grant corporate franchises was one of the prerogatives of the King. And the right to institute and to provide for the institution of colonial governments, whether by charter, proprietary grant, or commission, was likewise one of the prerogatives. Parliament had then nothing to do with the organization or government of colonies.

The confirmation, therefore, in the charter, of the grant of the lands from the Council of Plymouth (which derived title from

the grant of James I., and which could grant the lands, but could not grant nor assign powers of government), with a new grant, in form, of the same lands, gave to the grantees a title in socage; substantially a fee-simple, except that there was to be a rendition of one-fifth of the gold and silver ores. The grant of corporate powers, in the usual form of grants to private corporations, conferred upon them all the ordinary rights of a private corporation, under which they could dispose of their lands, and transact all business in which the company had a private interest. And the grant of any powers of colonial government, embraced in the charter, was valid and effective to the extent of the powers which were granted, whatever those powers might be; the whole, as against the corporation, being subject to forfeiture for sufficient cause.

The grant and confirmation of the lands, and the grant of mere corporate powers for private purposes, were private rights, which vested in the grantees; and which the King could not divest, except upon some forfeiture regularly enforced. Upon such forfeiture, the corporation would be dissolved, and all of the lands belonging to it would revert, in the nature of an escheat. But this would not affect valid grants previously made by it.

The grant of power to institute a colonial government, being a grant not for private but for public purposes, may have a different consideration. Whether by reason of its connection with the grant of the lands and of ordinary corporate powers, it partook so far of the nature of a private right, that it could not be altered, modified, or revoked, except on forfeiture, enforced by process; or whether this part of the grant had such a public character, that the powers of government were held subject to alteration and amendment;—is hardly open to discussion. At the present day it is held, that municipal corporations, being for public uses and purposes, have no vested private rights in the powers and privileges granted to them, but that they may be changed at the pleasure of the government. That principle seems to be equally applicable to a grant of colonial powers of government; and the better opinion would seem to be, that it was within the legitimate prerogative of the King, at that day, to modify, and even to revoke, the powers of that character which

had been granted by the Crown, substituting others appropriate for the purpose.<sup>1</sup>

If the King had assumed to revoke the powers of government granted by the charter, without substitution, or if he had imposed any other form of government, by which the essential features of that which was constituted under the charter would have been abrogated, it might have been an arbitrary exercise of power, justifying any revolutionary resistance which the Colony could have made. But the Crown, under the then existing laws of England, must have possessed legally such power over the Colony as the legislature may exercise over municipal corporations at the present day. The charter, so far as the powers of government were concerned, could not be treated as a private contract.

The charter was originally the only authority for the government of the territory embraced in it. The Council at Plymouth, in the county of Devon, never attempted to exercise powers of government over the Colony of Massachusetts; and there was no compact or agreement to form a government. The grantees professed, in all they did, to act under the charter, and, as they contended, according to the charter.

We are to look to the terms of the charter, therefore, and to a sound construction of its provisions, to ascertain what rights of legislation, religious or otherwise, were possessed by the grantees.

The charter bears date March 4, 1628 [29].

From a careful examination of it, I have no hesitation in maintaining five propositions in relation to it.

1. The charter is not, and was not, intended to be an act for the incorporation of a trading or merchants' company merely. But it was a grant which contemplated the settlement of a Colony, with power in the incorporated company to govern that

<sup>1</sup> If this distinction between public and private corporations, well settled at the present time, was not then recognized, it is not because there has been a change of principle since that period; but because the principles which govern these two descriptions of corporate rights were not then well developed; and hence the claim of the Crown to power over both public and private rights, and the claims of the colonists under their charter, without any distinction between the two. When a right application is made of this principle to the colonial history, it will show that the complaints of the colonists of infringement of their charters were not all well founded.

Colony. — This is shown from its whole structure, in the provisions relating to government, which I shall specify particularly under the other propositions, and moreover in the power given —

“to the Governor and Company, and their successors,” — “that it shall and may be lawful to and for the chief commanders, governors, and officers of the said company for the time being who shall be residents in the said part of New England in America by these presents granted, and others there inhabiting, by their appointment and direction, from time to time, and at all times hereafter, for their special defence and safety; to encounter, expulse, repel, and resist, by force of arms and by all fitting ways and means whatsoever, all such person and persons, as shall at any time hereafter attempt or enterprise the destruction, detriment, or annoyance to the said plantation or inhabitants, and to take and surprise by all ways and means whatsoever, all and every such person or persons with their ships, armor, munition, and other goods, as shall in hostile manner invade, or attempt the defeating of the said plantation, or the hurt of the said company and inhabitants.”

Here is a complete grant of the power to make defensive war, without any order from, or recourse to, the Crown; and, of course, according to the judgment of the company and its officers.

2. The charter authorized the establishment of the government of the Colony within the limits of the territory to be governed, as was done by the vote to transfer the charter and government.

I am aware that Mr. Justice Story, in his Commentaries on the Constitution, says, “It is observable that the whole structure of the charter presupposes the residence of the company in England, and the transaction of all its business there.”<sup>1</sup> But that position cannot be maintained. I venture to say, that there is no provision in the charter, which either expressly, or by implication, presupposes such residence. On the contrary, if it cannot be asserted that the whole scope of the charter contemplates the establishment of the government within the Colony, it will be found that it contains provisions which it would have been next to impossible to execute, except by a transfer of the charter and government to the place to be governed.

<sup>1</sup> 1 Story's Com. on the Const. § 64.

The charter provides that there shall, or may be, four general assemblies, which shall be styled and called the four great and General Courts of the company, in which, in the manner there provided, the Governor, or deputy, and such of the assistants and freemen of the company, as shall be present, "shall have full power and authority to choose, nominate, and appoint such, and so many others, as they shall think fit, and that shall be willing to accept the same, to be free of the said company and body, and them into the same to admit; and to elect and constitute such officers as they shall think fit and requisite, for the ordering, managing, and despatching of the affairs of the company."

Is it possible to believe that none of the emigrants, — the very men most interested in the administration of the affairs of the company, — were to be admitted as freemen, so as to have a voice? It would seem much more probable that it should have been intended they should form a majority. But how were they to attend the four General Courts, if these were held in England?

The clauses in relation to the election and removal of officers, and to the administration of the oaths of office, are still more significant.

"Yearly, once in the year," namely, the last Wednesday in Easter term, the Governor, deputy governor, and assistants, and all other officers of the company, were to be "newly chosen for the year ensuing," in the General Court, or assembly, to be held for that day and time, by the greater part of the company, for the time being, then and there present. And in case the Governor, deputy governor, any of the assistants, or *any other of the officers* to be appointed for the company, should die, or be removed (power being given to the company to remove for any misdemeanor or defect), it was made lawful for the company, in any of their assemblies, to proceed to a new election in the place of the officer so dying or removed; "and immediately upon and after such election," the authority, office, and power, before given to the officer removed, were to cease and determine.

By another provision of the charter, the Governor, deputy governor, assistants, and all other officers to be appointed and chosen, were required before they undertook the execution of their respective offices, to take an oath for the faithful perform-

ance of their duties. The Governor was to take the oath of office before the deputy governor, or two of the assistants; and the deputy governor, and assistants, and *all other officers chosen from time to time*, were to take their oaths before the Governor of the company.

It is readily seen that these provisions of the charter could be conveniently executed, if the company was within the Colony, and the government administered there. And a very slight examination shows how nearly impossible it would be to execute them, if the Colony was to be governed by a company in England. In the case of the death of the incumbent of an office, the duties of which were to be performed in the Colony, it would take a month for the intelligence of the decease to reach the company in England, and at least a month or six weeks more, ordinarily a much longer time, for a notice of the new election to reach the Colony; during which time, there would be no regular officer to perform the duties.

Is it answered that provision could be made by law, that in such case the duties should be performed by some other officer? That will not apply to the case of a removal, as it could not be known that the officer was removed, until a month or six weeks after the removal was made, and yet the office would be vacated at the time of the removal by the company in England; the officer performing acts supposed to be official, but which would be void.

The provision in relation to the oaths of office would be more nearly impracticable. All the officers, as we have seen, whether newly elected at an annual election, or to fill vacancies occasioned by death or removal, were to take the oath of office before they could execute the duties of the office; so that if the company remained in England, and the General Courts were held there, all the officers chosen for the managing and despatching of the affairs of the company, who resided in the plantation, and most of them must be there, would have to go to England to take their oaths of office, before they could execute their offices; or, the Governor would be obliged to be in the plantation to administer the oaths there, after notice who were elected; and after each annual election, the deputy governor, or two assistants, must first administer the oath to him, before he could go to the

plantation, or if he were there, must go themselves to the plantation to find him, and administer the oath there, before he could administer the oaths to others. Such a state of things would furnish too great a temptation, in any but a Puritan community, to some other oaths than oaths of office.

It has been suggested that in the clause authorizing the General Court to make laws, there is a provision which would authorize a law, by which other persons than the Governor, deputy governor, or assistants, might administer oaths; and this may be true in relation to oaths to be administered to any officers, other than "all other officers to be hereafter chosen as aforesaid, from time to time," by the company, although the provision refers more particularly to laws prescribing the *forms* of oaths than to the administration of them, as will be seen by a reference to the provision itself.

If, however, it is assumed that it conferred power to make laws for the administration of oaths by such persons as the laws of the Colony should prescribe, it must be limited to officers other than those chosen by the company. It could not be construed to authorize a law providing for the administration of oaths to the Governor, deputy governor, assistants, or to "all other officers to be appointed and chosen as aforesaid" (that is, to all officers of the company), otherwise than according to the special provisions of the charter already considered prescribing before whom they should take their oaths; for, thus construed, it would give a power to make laws contradictory to the provisions of the charter itself, which would be a construction entirely inadmissible.

No general provision authorizing the making of laws, "for the settling of the forms and ceremonies of government and magistracy," "for naming and styling of all sorts of officers, both superior and inferior," for "setting forth the duties, powers, and limits, of every such office and place, and the forms of such oaths warrantable by the laws and statutes of this our realm of England, as shall be respectively ministered unto them," &c., can operate to abrogate the special provisions which precede it; — authorizing the election of officers, annual elections, appointments in case of death and removal, and providing that "the newly elected deputy governor, and assistants, and all other

officers to be hereafter chosen as aforesaid, from time to time, shall take the oaths to their places respectively belonging before the Governor of the company for the time being."

Who, then, were the other officers to be hereafter chosen, as aforesaid, from time to time, respecting whom it was specially provided that they should take their oaths before the Governor? Certainly not merely the secretary, treasurer, and other persons, who should be directly connected with the meetings of the company. If the King had undertaken to plant a Colony, to prescribe the laws, and to appoint the officers; all the officers,—judges, sheriffs, attorney-general, &c., appointed by him, would have been officers of the Crown. When, instead of this, he committed the planting, ruling, appointing officers, &c., to the company; the judges, sheriffs, justices of the peace, and other officers appointed directly by the company, were officers of the company, as much so as the secretary and treasurer; and, as such, they were among the "other officers," who were required by the charter, to take their oaths before the Governor. Legislation providing for the administration of oaths to officers not appointed by the company might be valid; as would be provisions for the administration of oaths to jurymen, witnesses, &c.

If we infer that there was no supposition that the plantation would become so large as to require a great force of officers, it does not change the construction of the charter.

I admit that there were some proceedings which tend to show, that the requirements of the charter in respect to oaths were not fully understood by the members of the company generally. At the General Court in England, on the 30th April, 1629, Endicott, who had come over as governor of the plantation, before the charter was granted, was elected or confirmed as governor, and a deputy governor and council were appointed; and it was ordered, that the Governor, deputy governor, and council then in New England, should make choice of a secretary and other needful officers, and should frame and administer to them such oaths as they should think good. But this was very soon after the charter was procured, and while its provisions were imperfectly understood, as is evident from the fact that, at the same meeting, it was ordered, that Governor



Endicott, or his deputy, and the council, having taken their oaths,—

“shall have full power and authority, and they are hereby authorized, by power derived from His Majesty’s letters patent, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, not contrary to the laws of the realm of England, for the present government of our plantation, and the inhabitants residing within the limits of our plantation, a copy of all which orders is to be sent to the company in England.”<sup>1</sup>

It is quite clear, that those who passed this vote to confer upon the administrative government in the plantation — “by power,” as they alleged, “derived from His Majesty’s letters patent” — full authority to make laws, while the company to which the power was granted existed in England, had not an exact comprehension of the nature and character of the charter; for this vote assumed, that the power to make laws was assignable, or rather that it might be duplicated. Whether there were those who had a better knowledge, but thought that some such measure was necessary until the charter and government could be transferred, cannot now be known.

The attempt at two governments, in a modified form, continued some time afterwards.

“It was thought fit, in making the transfer, that the government of persons should be held in the plantation, and the government of trade and merchandise should be in England.”

These proceedings occasioned the charge in the *quo warranto*, in 1635, that they held two councils, — one in England, and the other in America.

Authority was also given by the charter to the Governor, deputy governor, or any two assistants, to administer “the oath and oaths of supremacy and allegiance, or either of them, to all and every person and persons, which shall at any time or times go to or pass to the lands and premises” granted, to inhabit the same.

Persons, not subjects, might go with the assent of the company. Suppose there had been a disposition to administer these oaths, and all persons had been required, in conformity

<sup>1</sup> See Mass. Records, vol. i. pp. 38, 361, 386; Hazard’s Coll., vol. i. pp. 256, 268.

with this authority, to take them : were persons proposing to emigrate, to seek, in England, for the officers authorized to administer them, and take the oaths before embarkation ? Were strangers, — foreigners, — expected to do so ?

The absurdity of provisions intended to operate in the manner stated, more especially in relation to removals and the administration of the oaths of office, furnishes plenary evidence that no construction was intended confining the company to England ; and we are led, therefore, to the conclusion, that the transfer was not only beyond exception, but that it was perhaps contemplated by some of the parties interested, when the charter was granted.

The intrinsic difficulty of making laws for and governing such a colony by a corporation having its locality in England, would seem to be so apparent as to be evidence respecting the intent, and the true construction of the charter.

It was necessarily within the scope of the charter, that the grantees should occupy and cultivate the lands confirmed and granted by it, in the place where they were situated. It was equally, if not necessarily, within its scope, to exercise the private corporate privileges which related to those lands, in the place of their location, — and to institute and administer the political government, over the persons settled upon them, in the place which they inhabited.

There is also strong extraneous evidence to show, that there must have been a supposition, on the part of some of those concerned, that the charter and government would be transferred at an early day. Before the charter was obtained, and, it seems probable, during the time in which efforts were making to procure it, the grantees, under the grant from the Council of Plymouth, had adopted measures for the settlement of the plantation. Endicott embarked in June, 1628 ; arriving in September, with power to manage their affairs, and it appears with the title of Governor. A letter was addressed to him and others, April 17, 1629, informing them that the charter was obtained, confirming him as governor, and joining seven persons with him as a council. Then came the proceedings of April 30th already referred to. The experience of less than a year may have shown the necessity of having oaths of office administered in the plantation, and

of having the laws made where they were to be administered, and thus have led to the orders of that date, without much study of the charter itself, by those members of the company who had not been actively engaged in procuring it; while those who better understood its provisions, in view of the probable transfer of the charter and government in a short time, did not deem it expedient to interpose objections.

At a General Court under the charter, May 13, 1629, Cradock was elected governor of the company for the year ensuing.<sup>1</sup> But at a court held July 28th, "Mr. Governor read certain propositions, conceived by himself; viz., that for the advancement of the plantation, the inducing persons of worth and quality to transplant themselves and families thither, and for other weighty reasons therein contained, to transfer the government of the plantation to those that shall inhabit there, and not to continue the same in subordination to the company here, as it now is." Those present were desired privately and seriously to consider of it, and produce their reasons at the next General Court, and in the mean time to carry the business secretly that it be not divulged.<sup>2</sup>

This was, doubtless, in connection with the negotiations with Winthrop and others, to come over and settle. But following so closely upon the grant of the charter, and taken in connection with its provisions, the inference is strong, I think, that the matter had been previously agitated among some of those interested.

At a General Court held August 29th, the reasons *pro* and *contra* having been heard, it appeared, by a hand vote, that it was the general desire and consent of the company, that the government and plantation should be settled in New England, and it was ordered accordingly.<sup>3</sup>

Other evidence is derived from the fact, that no objection appears to have been made by the King or his Council, which strengthens the inference that the crown lawyers, who examined the charter, must have supposed that such a movement was probable.

Mr. Justice Story says, "The power of the corporation to make the transfer has been seriously doubted, and even denied. But the boldness

<sup>1</sup> Mass. Records, vol. i. p. 40.

<sup>2</sup> Mass. Records, vol. i. p. 49.

<sup>3</sup> Mass. Records, vol. i. p. 51.

of the step is not more striking than the silent acquiescence of the King in permitting it to take place."<sup>1</sup>

If, however, we suppose that some of his councillors, when the charter was examined, saw that this might be done, the wonder ceases.<sup>2</sup>

Upon petition of Sir Christopher Gardiner, Sir Ferdinando Gorges, and Captain John Mason, growing in part, doubtless, out of Gardiner's grievances, and in part, probably, out of the conflict of title in the others, but representing "great distraction and much disorder" in New England, the matter was referred to the Privy Council, and examined by a committee, who heard the complainants, and divers of the principal adventurers. Whereupon, without determining certain contested matters of fact, resting to be proved by parties that must be called from the Colony, the Council, Jan. 19, 1632, "not laying the fault or fancies (if any be), of some particular men, upon the general government or principal adventurers,"<sup>3</sup> thought fit to declare "that the appearances were so fair, and hopes so great, that the country would prove both beneficial to this kingdom, and profitable to the particulars, as that the adventurers had cause to go on cheerfully with their undertakings; and rest assured *that if things were carried as pretended when the patents were granted, and accordingly as by the patent is appointed*, his Majesty would not only maintain the liberties and privileges heretofore granted, but supply any thing farther that might tend to the good government, prosperity, and comfort of his people there, of that place."<sup>4</sup> This shows, conclusively, not only that no objections were then taken by the Privy Council to the transfer of the charter and government, but that none were taken to the general exercise of the powers of a colonial government, in the manner in which the grantees were exercising them.

Winthrop, in his History of New England, referring to the first intelligence of this proceeding, says, "The principal matter

<sup>1</sup> 1 Story's Com., § 65.

<sup>2</sup> These matters are not material to the determination of the question whether the transfer was lawfully made. But the inference that it was originally contemplated seems so strong, that I have deemed it expedient to call attention to the facts.

<sup>3</sup> Hutch. Coll. Papers, p. 53.

<sup>4</sup> Hutch. Coll. Papers, p. 54; Chalm. Annals, vol. i. p. 155; Neal's Hist., p. 154.

they had against us, was the letters of some indiscreet persons among us, who had written against the church government in England." <sup>1</sup> But in a subsequent paragraph, having then, it is to be presumed, received a copy, he speaks of the petition, as "accusing us to intend rebellion, to have cast off our allegiance, and to be wholly separate from the church and laws of England; that our ministers and people did continually rail against the State, and church, and bishops there," &c. Sir Richard Saltonstall, Mr. Humfrey, and Mr. Cradock were called before a committee of the Council, and a hearing was had. Winthrop says further, that —

"The king, when the matter was reported to him by Sir Thomas Jermyn, one of the Council, who spoke much in commendation of the Governor, both to the lords, and afterwards to his Majesty, said that he would have them severely punished, who did abuse his governor and the plantation; that the defendants were dismissed with a favorable order for their encouragement, being assured by some of the Council, that his Majesty did not intend to impose the ceremonies of the Church of England upon us, for that it was considered, that it was the freedom from such things that made people come over to us." <sup>2</sup>

There were subsequent complaints from two classes of persons, — those who had adverse territorial claims, and those who had experienced the discipline of the Colony. Mason was particularly active, insomuch that Winthrop appears to have been resigned to the providence of God, which, in 1635, "in mercy, taking him away," terminated his efforts to overthrow the government.<sup>3</sup>

In February, 1633-34, on the understanding of the transportation of great numbers to New England, among them "divers persons known to be ill affected, discontented not only with civil, but ecclesiastical government here, whereby such confusion and distraction is already grown there, especially in point of religion, as, beside the ruin of the said plantation, cannot but highly tend to the scandal both of Church and State here," there was an order of the King in Council to stay divers ships then in the Thames, ready to set sail, with an order that the masters and freighters should attend the Council, and a

<sup>1</sup> Winthrop's Hist., vol. i. p. 100.

<sup>2</sup> *Ib.*, p. 103.

<sup>3</sup> *Ib.*, p. 187.

further order, "that Mr. Cradock, a chief adventurer in that plantation, now present before the board, should cause the letters patent for the plantation to be brought before this board."<sup>1</sup>

The ships were permitted to sail, on representations respecting the commercial interests which would be affected by their detention; and it would seem from what followed, that Cradock answered, that the charter was in the hands of Winthrop.

Laud became Archbishop of Canterbury in 1633; and his influence may perhaps be traced in this action of the Privy Council. Winthrop attributes it to "the archbishops and others of the Council;" and supposes that the intention was "to call in our patent."<sup>2</sup>

Shortly afterwards, on the 28th of April, 1634, a commission for regulating plantations, was issued to the Archbishop of Canterbury, the Lord Keeper, and others, most, if not all, of them members of the Privy Council, giving them, among other things, power of protection and government over the colonies planted and to be planted, "power to make laws, ordinances, and constitutions, concerning either the *State public* of the said colonies, or utility of private persons, and their lands, goods," &c.; "and for *relief and support of the clergy*;" "and for *consigning of convenient maintenance unto them by tithes*," &c.; power to inflict punishment on offenders by imprisonment and other restraints, or by loss of life, or members; power to hear and determine all complaints, whether against the whole colonies, or any governor, or officer. And then comes a clause, the intent of which may readily be discovered from what followed.

"And we do, furthermore, give unto you, or any five or more of you, letters patents, and other writings whatsoever, of us or of our royal predecessors granted, for or concerning the planting of any colonies, in any countries, provinces, islands, or territories whatsoever, beyond the seas; and if, *upon view thereof*, the same shall appear to you, or any five or more of you, to have been surreptitiously and unduly obtained, or *that any privileges or liberties therein granted, be hurtful to us, our Crown or*

<sup>1</sup> Hutch. Hist., vol. i. p. 33. From the order in which these proceedings are stated in Hubbard and Hutchinson, it would appear, that the King's expression of satisfaction was at the close of this hearing in 1633; but the dates in Winthrop's History show that to have been the year previous. Hubbard's dates in regard to these matters are not trustworthy.

<sup>2</sup> Winthrop, vol. i. p. 136.

*prerogative royal*, or to any foreign princes, to cause the same, according to the laws and customs of our realm of England, to be revoked; and to do all other things which shall be necessary, for the wholesome government and protection of the said colonies and our people therein abiding."<sup>1</sup>

It appears from a recital in a subsequent order, made in 1638, that the Commissioners, in 1634 or 1635, gave an order "to Mr. Cradock, a member of that plantation, to cause the grant or letters patent of that plantation (alleged by him to be there remaining in the hands of Mr. Winthrop) to be sent over hither."

In pursuance of the project for a general governor for the whole of New England, Gorges was directed to confer with the Council at Plymouth, to resolve whether they would resign their patent; and in April, 1635, the Duke of Lenox and others of that company, supposed to be acting in Gorges' interest, presented to the Lords of the Council<sup>2</sup> a petition, proposing to surrender; but praying, among other things, that the patent for the plantation of the Massachusetts Bay might be revoked.

Under the direction of the Commissioners, Sir John Banks, the Attorney-General, brought a *quo warranto* to enforce a forfeiture, in 1635. The process seems to have been founded upon an assumption, that the company had no rights whatever. There were fourteen allegations of usurpation: denying the defendants' claim of title to land, their claims to be a corporation, and to have the sole government of the country, &c.; and alleging that they made laws and statutes against the laws of England. There was no allegation that they had unlawfully established the government within the colony; but among the usurpations set forth was, —

"to keep a constant council in England of men of their own company and choosing, and to name, choose, and swear certain persons to be of that council; and to keep one council, ever resident in New England, chosen out of themselves, and to name, choose, and swear whom they please to be of that council."

Also, to have several common seals.<sup>3</sup> There was no service in the Colony;<sup>4</sup> but service was made upon several of the grantees

<sup>1</sup> Hutch. Hist. (App.) vol. i. p. 502.

<sup>2</sup> The Commissioners for Foreign Plantations are often so called, and there is danger of confusion, unless care is taken to distinguish their acts from those of the Privy Council.

<sup>3</sup> Hutch. Coll. Papers, p. 101.

<sup>4</sup> Hutch. Hist., vol. i. p. 86.

who were in England, each of whom, except Cradock, pleaded severally that he never usurped any of said liberties, and disclaimed. Against them, there was judgment that they should not for the future intermeddle with any of said franchises, but should be for ever excluded from the use of the same. Cradock appeared, and then made default; upon which there was judgment that he should be convicted of the usurpation charged, and that the liberties, privileges, and franchises should be taken and seized into the King's hand. The process was pending about two years, and there was judgment of outlawry against the rest of the patentees.<sup>1</sup> But this judgment availed nothing. Jones and Winnington, attorney and solicitor general, in 1678, concurred in an opinion, "that neither the *quo warranto* was so brought, nor the judgment thereupon so given, as could cause a dissolution of the charter."<sup>2</sup> The particular reasons were not stated. But we may well suppose the reason to have been, that there was no service on the corporation, nor on any of the members in Massachusetts, nor any legal outlawry as against them, and judgment of seizure was rendered against Cradock only. The reason for this probably was, that the process of the Court of King's Bench did not run into the Colony, because the Court had no jurisdiction there; and there could, of course, be no legal service there.

April 4th, 1638, the Lords Commissioners, taking into consideration that complaints grow more frequent "for want of a settled and orderly government in those parts;" and, calling to mind their former order to Mr. Cradock, about two or three years since, to cause the patent to be sent over; and, being informed by the attorney-general that judgment had been entered in the *quo warranto*, ordered that the clerk of the council, attendant upon them, should, in a letter from himself to Mr. Winthrop, convey their order; in which, "in his Majesty's name, and according to his express will and pleasure," as they said, they strictly required and enjoined him, or any other who had the custody, that they fail not to transmit the patent by the return of the ship; —

"it being resolved, that, in case of any further neglect or contempt by them showed therein, their Lordships will cause a strict course to be

<sup>1</sup> Hutch. Coll. Papers, p. 103.

<sup>2</sup> Chalmers's Annals, vol. i. pp. 405, 439.



taken against them, and will move his Majesty to reassume into his hands the whole plantation."<sup>1</sup>

The General Court replied, that they were much grieved that their Lordships should call in the patent, there being no cause known to them, and no delinquency or fault of theirs expressed in the order; asking to know what was laid to their charge, and to have time to answer; assuring their Lordships that they were never called to answer the *quo warranto*; and if they had been, they doubted not that they should have put in a sufficient plea; and representing that, if the patent should be taken from them, they should be looked on as "runnigadoes" and outlaws, enforced to remove to some other place, or to return to their native country, either of which would put them to unsupportable extremities; and that (among other evils enumerated) the common people would conceive, that his Majesty had cast them off, and that they were freed from their allegiance, and thereupon would "be ready to confederate themselves under a new government, for their necessary safety and subsistence, which will be of dangerous example to other plantations, and perilous to ourselves of incurring his Majesty's displeasure."<sup>2</sup>

These repeated calls for the patent were in fact demands for its surrender, and they so understood.

Hutchinson says, "It was never known what reception this answer met with. It is certain that no further demand was made."<sup>3</sup> But he is mistaken.

It appears from Winthrop's History, vol. i. p. 298, that in 1639 — the precise date is not given —

"The Governor received letters from Mr. Cradock, and in them another order from the Lords Commissioners, to this effect; that, whereas they had received our petition upon their former order, &c., by which they perceived, that we were taken with some jealousies and fears of their intentions, &c., they did accept of our answer, and did now declare their

<sup>1</sup> Hutch. Coll. Papers, vol. i. p. 105. Hutchinson appends to a copy of the order this note: "Whether the intent of this order was, that the patent should be sent over, that the government of the colony might be under a corporation in England according to the true intent of the patent, or whether it was that the patent might be surrendered, is uncertain." But the *quo warranto* might have solved that doubt.

<sup>2</sup> Hutch. Hist. App., vol. i. p. 507; Winthrop, vol. i. p. 299.

<sup>3</sup> Hutch. Hist., vol. i. p. 88.

intentions to be only to regulate all plantations to be subordinate to their said Commission ; and that they meant to continue our liberties, &c. ; and therefore did now again peremptorily require the Governor to send them our patent by the first ship ; and that, in the mean time, they did give us, by that order, full power to go on in the government of the people, until we had a new patent sent us ; and withal they added threats of further course to be taken with us, if we failed !”

The next paragraph of the History is a curiosity, and I cannot resist the temptation to copy it in full. It shows why Hutchinson never heard of the reception, and the further demand :—

“This order being imparted to the next General Court, some advised to return answer to it. Others thought fitter to make no answer at all ; because, being sent in a private letter, and not delivered by a certain messenger, as the former order was, they could not proceed upon it, because they could not have any proof that it was delivered to the Governor ; and order was taken, that Mr. Cradock’s agent, who delivered the letter to the Governor, &c., should, in his letters to his master, make no mention of the letters he delivered to the Governor, seeing that his master had not laid any charge upon him to that end.”

The Lords Commissioners frankly admit their object, in this last order. They intended to bring all the plantations into subjection under their commission. The charter stood in their way. They called for it, and it did not come. Process to enforce a forfeiture of it had failed. There was a very good reason for this thrice-repeated demand by the Commissioners. Their commission purported to give it to them, with authority to revoke it, if, upon view of it, they found any thing hurtful to the King, his crown, or prerogative royal. The possession of it was thus made necessary to a revocation by the Commissioners. A view of a copy was not sufficient. No reason is apparent why this might not have been made otherwise. Perhaps it would have been, if there had been apprehension of difficulty in obtaining possession. But so it stood. Therefore the repeated attempts to obtain a surrender, with the threats if it was not forthcoming. It was important to exhibit a semblance of a legal revocation. There were too many complaints of the exercise of arbitrary power in England, to render it expedient to add others in relation to the colonies.

We have seen how the General Court disposed of the last

demand; and the King and Laud soon found other matters to occupy their attention.

Now in all these proceedings, the character of which I have stated in detail, I find no trace of an allegation, that "the true intent of the patent" was, that the government of the Colony should be under a corporation in England; and I submit, that the omission of such an allegation was a moral impossibility, if it had been so understood, especially as the transfer of the charter caused the main obstacle to the efforts of the Commissioners to revoke it.

The first appearance of an official objection which I have found, against the transfer, was in July, 1679, in the course of the difficulties in which Randolph was so conspicuous; "when," as Chalmers says, "the King wrote to the General Court, and required that other agents should be sent over, properly instructed; giving as a reason, which struck at the foundation of its power, that, since the charter by its frame was originally to have been executed within the kingdom, otherwise than by deputy, it is not possible to establish perfect settlement till those things are better understood."<sup>1</sup> This objection is among the articles of high crimes and misdemeanors presented by Randolph to the Committee of the Council, in 1682.<sup>2</sup> But it finds no place in the process in Chancery, in 1684, in which a decree was entered, that the charter be vacated, and cancelled.<sup>3</sup>

Chalmers, in another place, states, that the Attorney-General, Sawyer, gave it as his official opinion, "that the patent having created the grantees *and their assigns* a body corporate, they might transfer their charter and act in New England." The reason thus stated, is certainly not satisfactory. Chalmers adds, that "the two Chief Justices, Rainsford and North, fell into a similar mistake, by supposing that the corporate powers were to have been originally executed in New England,"<sup>4</sup> — an opinion which I have endeavored to sustain, by the terms of the charter, before I was aware of the high authority by which it was supported.

Usage is permitted to give a construction to an ancient charter or deed, where there is an ambiguity. Here was a use of the powers of government under the charter, — holding

<sup>1</sup> Chalmers's Annals, vol. i. p. 408.

<sup>2</sup> *Ib.*, p. 462.

<sup>3</sup> Mass. Hist. Coll. 4th Series, vol. ii. p. 246.

<sup>4</sup> Chalmers, p. 173.

General Courts, and transacting all the business of the corporation within the Colony, which, if unlawful, rendered all the acts done under it during the time legally invalid,—with no objection on the part of the Crown in that particular, although other objections were made that the corporation had transcended its powers.

If this is not strictly a “usage” within the general rule, it is a contemporaneous construction by all parties, which is as strong, and even stronger, evidence than usage, to give the true interpretation of an instrument. When we add to this the fact, that in two processes to enforce the forfeiture of the charter, there is an entire omission of any allegation that wrong had been done in this respect, the evidence is sufficient to overcome any, even a very grave, ambiguity. But the fact, that there is here no ambiguity, explains the absence of all objections.

I am referred to “A copy of the docquet of the grant to Sir Henry Rosewell and others, taken out of the Privy-seal-office, at Whitehall,” authorizing the draft of the charter; to show that it was the intention of the Crown or Council that the corporation should have its residence in England. It runs thus:—

“A grant and confirmation unto Sir Henry Rosewell, his partners, and their associates, to their heirs and assigns for ever, of a part of America, called New-England, granted unto him by a charter from divers noblemen and others, to whom the same was granted by the late king James, with a tenure in socage, and reservation of one-third part of the gold and silver ore: Incorporating them by the name of the governor and company of the Massachusetts-Bay, in New-England, in America, with such other privileges, for electing governors and officers here in England for the said company; with such other privileges and immunities as were originally granted to the said noblemen and others, and are usually allowed to corporations here in England. His majesty’s pleasure, signified by Sir Ralph Freeman, upon direction of the lord-keeper of the great-seal; subscribed by Mr. Attorney-general; procured by the lord viscount Dorchester; February, 1628. Memorandum. Their charter passed 4<sup>th</sup> March following.”<sup>1</sup>

I will admit that this is explicit enough to show that there was an intention when that minute was made, that the corporation should have a local habitation in England.

But I remark first, that by the plainest rules of evidence, this memorandum of the proceedings of the Council, prior to the

<sup>1</sup> Chalmers’s Annals, vol. i. p. 147.

grant of the charter, cannot be admitted as evidence to control or vary the provisions of this instrument, as actually drawn up, formally executed, with the great seal annexed, and made matter of record; or to show the intention at the time of the final execution. In the absence of all ambiguity, the intention is to be derived only from the instrument itself.

My next remark is, that this "docquet," taken in connection with the charter itself, and other admitted facts, furnishes most plenary proof that the intention thus appearing, was in fact changed when the charter was afterwards drawn and authenticated. There would be no need of another "docquet" to show this, as the charter itself would and did show it.

The palpable difference between the terms of this memorandum and the charter itself, in the omission of an express provision in the charter assigning a residence in England to the corporation, can be accounted for only on a change of intention upon that point. It was not a matter which could have slipped out accidentally, and the omission have escaped the scrutiny to which the charter must have been subjected after it was prepared, and before it passed the great seal.

Further, the docquet shows an intention at that time, to grant such other privileges and immunities as were originally granted to the said noblemen and others (the Council at Plymouth), and are usually allowed to corporations in England. Here again, the great difference between the charter itself, and the intention shown by the minutes, is palpable evidence of a change of intention in this respect, also. It is sufficient to specify the difference in two or three particulars.

The Council consisted of forty members, each of whom were to be presented to the Lord Chancellor, or the Lord High Treasurer, or the Lord Chamberlain of the Household, to take his oath. Power was given to the President, deputy, or any two councillors, to administer the oaths of allegiance and supremacy to all persons who should go to the Colony of New England; and it was made *lawful* for them to minister oaths as well to persons employed by them, for the faithful performance of their service, as to other persons, for the clearing of the truth; but there was no clause requiring officers other than those who were councillors to take any oath of office; and their laws, as we

have seen, were to be as near as conveniently might be to those of England. The difference between the Council at Plymouth, and the Governor and Company of Massachusetts Bay, was substantially between an aristocratic corporation, composed of forty noblemen and gentlemen, which was to exercise its powers at a specified place in England, and make laws like the laws of England, as near as conveniently might be, and which might or might not administer oaths to persons in its employment; and a democratic corporation of an indefinite number, which was to hold General Courts, and might enact such laws as should be found expedient, so they were not contrary to the laws of the realm; which was required to administer oaths to all the officers, in a particular mode, for the faithful discharge of their duties; and which was not restricted as to place, so that it might set up its government either in England or on the Plantation, as it should see fit. Assuredly the docquet did not govern the provisions of the charter.

After setting out the copy of the docquet, Chalmers proceeds, —

“In the same papers, bundle 5, page 322, there is a sketch, drawn by Mr. Blathwayt, stating ‘the clauses in the charter, shewing, that it was intended thereby that the corporation should be resident in England.’ And, indeed, the whole tenor of the patent, as well as the subsequent conduct of the corporation, evinces the truth of that important fact. But the following extract of an agreement, entered into at Cambridge, the 26th of August, 1629, between Saltonstall, Dudley, Winthrop, and other chief leaders of Massachusetts, demonstrates that truth. From a collection of papers, made by Mr. Hutchinson, relative to the history of Massachusetts, p. 25-6 : —

“‘We sincerely promise, to embark for the said plantation, by the first of March next, to the end to pass the seas (under God’s protection), to inhabit and continue in New England. Provided always, that, before the last of September next, the whole government, together with the patent for the said plantation, be first, by an order of Court, legally transferred and established, to remain with us and others, which shall inhabit upon the said plantation.’”

Blathwayt was contemporary with Randolph. It seems, therefore, that this specification of clauses was made about the time Randolph was alleging that the government was unlawfully

established in Massachusetts; that is to say, some forty or fifty years after its establishment there. What these clauses were, I am unable to say. Chalmers does not state them, and, unfortunately, I do not find them in the charter.

But the most wonderful evidence of an intention that the corporation should be resident in England, is that derived by Chalmers from the agreement of Winthrop and others, which he copies, and which he says demonstrates its truth. His conclusion is to be accounted for, perhaps, by the supposition that he understood the words, "by an order of Court," in this agreement, to refer to the Court of his Majesty, at Whitehall; whereas, the contracting parties had reference to an order of the General Court of the Company, such as was passed three days afterwards.

Chalmers concedes that this docquet "evinces, that what was so strongly asserted, during the reign of Charles II., to prove that the charter was surreptitiously obtained, is unjust."

I have considered this proposition at length; not only because the transfer has sometimes been regarded as sharp practice on the part of the grantees, but for the reason, already suggested, that, if the transfer was unlawful, the whole legislation of the company afterwards was unwarranted. The company had power to make laws for, and to govern, a Colony. But their authority to do this was as a corporation; and a corporation, having a fixed locality, cannot hold corporate meetings, make by-laws, elect officers, and do other acts necessary to be done by the corporation itself, except in the place where it has its legal residence. In the absence of prohibition or limitation, it may hold property, may trade, and perform other acts which can be done by agents, elsewhere.

3. The charter gave ample powers of legislation and of government for the Plantation, or Colony, including power to legislate on religious subjects, in the manner in which the grantees and their associates claimed and exercised the legislative power.

It granted power to the General Courts —

"from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, not contrary to the laws of this our realm of England, as

well for settling the forms and ceremonies of government and magistracy, fit and necessary for the said plantation, and the inhabitants there, and for naming and settling all sorts of officers, both superior and inferior, which they shall find needful for that government and plantation, and the distinguishing and setting forth of the several duties, powers, and limits of every such office and place, and the forms of such oaths warrantable by the laws and statutes of this our realm of England as shall be respectively ministered unto them, for the execution of the said several offices and places; as also for the disposing and ordering of the elections of such of the said officers as shall be annual, and of such others as shall be to succeed in case of death or removal, and ministering the said oaths to the newly elected officers, and for impositions of lawful fines, mulcts, imprisonment, or other lawful correction, according to the course of other corporations in this our realm of England; and for the directing, ruling, and disposing of all other matters and things, whereby our said people, inhabitants there, may be so religiously, peaceably, and civilly governed, as their good life and orderly conversation may win and incite the natives of the country to the knowledge and obedience of the only true God and Saviour of mankind, and the Christian faith, which, in our royal intention and the adventurer's free profession, is the principal end of this plantation."

"Willing, commanding, and requiring, ordaining and appointing," that all such orders, laws, statutes, and ordinances, instructions and directions, as should be so made by the Governor, deputy governor, assistants, and freemen, and published in writing under their common seal, should be carefully and duly observed, kept, performed, and put in execution; the letters patent to be to all officers a sufficient warrant therefor, against the King himself, and his heirs and successors.

But there was a restriction upon their legislation, religious as well as civil. They were to make no laws contrary to the laws of the realm; and the question arises, What was the character and what the extent of this restraint?

We may safely conclude that the meaning of the provision is not that they are to make no laws different from the common law of England, for much of that law was entirely inapplicable to their condition, so that they were under the necessity of making different laws. Laws different from, contrary to, the laws of feudal tenure could not come within the prohibition. The same may be said of laws relating to the peerage, and divers other matters of more common concern.



So we may be assured that it was not a prohibition to make laws different from the statutes of England, for it was known that it was to escape from some of those laws that they emigrated. If they could make no law which provided for a different form of worship than that which was established in England,—if they must establish that with all its concomitants, they would hardly have crossed the Atlantic for the privilege of voluntarily subjugating themselves by their own acts, to the pains and penalties, and violation of conscience, to which the acts of others would have subjected them if they had remained. Moreover, they had no bishops,—could not consecrate any,—and no one proposed to do that for them when the charter was granted. Laud would doubtless have been pleased to do them that favor three or four years afterwards; but their right of legislation, or the restraints upon it, or the removal of restraints, did not depend upon that.

The true construction of the clause is, that they shall make no laws contrary to,—antagonistic to,—in contravention of, the laws of the realm which extended or should extend over them, as inhabitants of the Colony, and which were to be their paramount law.

We are thus brought to the question, whether any, and what laws of the realm were in force in the Colony at the time of the charter and emigration. Happily we can settle this question by authority. It is agreed that the law of the conqueror does not extend over the conquered country, until the conqueror pleases to put it in force there. And although we now hold that the title of the Crown to the greater portion of this country was by right of discovery, it was held by the Courts of England, long subsequent to the reign of Charles I., to be a title by conquest. Chief-Justice Holt, in the Court of King's Bench, in the 4th of Anne, said, "The laws of England do not extend to Virginia! being a conquered country, their law is what the King pleases."<sup>1</sup> And Blackstone, lecturing as late as 1756, says, "Our American plantations are principally of this latter sort [conquered or ceded countries], being obtained in the last century, either by right of conquest, and driving out the natives, (with what natural justice I shall not at present inquire), or by

<sup>1</sup> Salkeld's Reports, vol. i. p. 666.

treaties. And, therefore, the common law of England, as such, has no allowance or authority there." He adds, that they are "not bound by any acts of Parliament, unless particularly named."<sup>1</sup>

Mr. Justice Story, it is true, says of the doctrine of Mr. Justice Blackstone, "It is manifestly erroneous, so far as it is applied to the colonies and plantations composing our Union. In the charters, under which all these colonies were settled, with a single exception [Pennsylvania], there is, as has been already seen, an express declaration, that all subjects and their children inhabiting therein, shall be deemed natural-born subjects, and shall enjoy all the privileges and immunities thereof; and that the laws of England, so far as they are applicable, shall be in force there; and no laws shall be made, which are repugnant to, but as near as may be conveniently, shall conform to the laws of England."<sup>2</sup>

But here is a great mistake, so far as it relates to Massachusetts. There is no provision, either in the Colony or in the Province charter, that the laws of England, so far as they are applicable, shall be in force there; nor that the laws of the Colony or Province shall, as near as conveniently may be, conform to the laws of England.

He says farther, "Now, this declaration, even if the Crown previously possessed a right to establish what laws it pleased over the territory, as a conquest from the natives, being a fundamental rule of the original settlement of the colonies, and before the emigrations thither, was conclusive, and could not afterwards be abrogated by the Crown."

And in the next section, "The universal principle (and the practice has conformed to it) has been, that the common law is our birthright and inheritance; and that our ancestors brought hither with them, upon their emigration, all of it which was applicable to their situation."

<sup>1</sup> Blackstone's Com., vol. i. p. 108.

<sup>2</sup> Story's Com. on the Constitution, § 156. — The principle that the laws of the discoverer extend over the discovered country, without any action for that purpose, if sound to any extent, must be subject to grave limitations. One of the reasons given why the laws of the conqueror do not extend over the conquered country is, "because, for a time, there must want officers, without which our laws can have no force." (Salkeld's Reports, vol. i. p. 412.) That would certainly apply with its full force to the discoveries in America. If the colonists had found the common law here, or had brought it with them, it must have been packed away, until the machinery was provided to put it in operation. Another reason, viz., that the laws of the conqueror may not be suited to the state and condition of the conquered, is applicable, to a great extent, in the case of settlement, under title derived from discovery.

This allegation may be found repeated again and again, — in judicial decisions, even, since the time of the Province charter, — but it must be taken with some grains of allowance. Applied to the early emigrants and their proceedings, it cannot be supported. As to them, there is better and more satisfactory evidence that they did not bring the common law with them as a part of their law, than can be derived from any inference respecting the general principle which would govern the case, either as an acquisition by conquest, purchase, or discovery.

James I. having the right to govern the country either directly or through a local government established by him, granted the charter of the Council at Plymouth, in the county of Devon, giving the grantees power to correct, punish, pardon, govern, and rule, the inhabitants —

“according to such laws, orders, ordinances, directions, and instructions, as by the said Council aforesaid shall be established; and, in defect thereof, in cases of necessity, according to the good discretions of the said governors and officers respectively, as well in cases capital and criminal as civil, both marine and others; so always as the said statutes, ordinances, and proceedings, as near as conveniently may be agreeable to the laws, statutes, government, and policy of this our realm of England.”

The Puritans claimed title to their lands under this charter, but not their corporate authority and privileges. Their charter gave them power to pass laws, without any provision for the introduction of the common law, and not even requiring that their laws and proceedings should be as near as conveniently might be to the laws of the realm; but providing that they should make none contrary to the laws of the realm. The grantees neither claimed nor recognized the common law as a part of the laws by which they were governed. There is nothing in their records, nor in their statutes, nor in their declarations, to show any recognition of it as their law. It neither regulated the rights of persons or things, nor did it furnish the rule of judicial decision. Where a discretionary power was vested in the magistrate, he consulted the common law with an inquiry how the case would be determined by that law, and it is quite probable that he usually adopted it, because it is said to be founded in right reason; and for reasons of a prudential character, it was desirable that their proceedings should be, in the language of the

charter of the Council at Plymouth, as near as conveniently might be, agreeable to the laws and policy of the realm. But the magistrate was not bound by it, being at perfect liberty, if he thought fit, to act on what he deemed a better opinion of his own.

The claim of the colonists, that the common law was a part of their birthright, and formed a part of their laws, came in at a later period, after their controversies with the Crown had assumed grave proportions. It was interposed as a shield against arbitrary power, and was doubtless founded upon the clause in the charter securing to them the privileges and immunities of natural-born subjects, perhaps also upon a general principle to that effect in the absence of special provisions. It may be a matter of curious inquiry to ascertain the precise circumstances of its introduction and reception.

The Puritans claimed the right to pass their own laws, with the Bible, and not the common law, as their fundamental law.

This is conclusively shown by the answer of the General Court, in 1646, to the petition of Dr. Child and others, complaining, among other things, that they could not, according to their judgments, discern a settled form of government according to the laws of England. To this complaint the answer is, —

“ For our government itself, it is framed according to our charter and the fundamental and common laws of England, and carried on according to the same (taking the words of eternal truth and righteousness along with them, as that rule by which all kingdoms and jurisdictions must render account of every act and administration, in the last day), with as bare allowance for the disproportion between such an ancient, populous, wealthy kingdom, and so poor an infant thin colony, as common reason can afford. And because this will better appear by comparing particulars, we shall draw them into a parallel. In the one column we will set down the fundamental and common laws and customs of England, beginning with Magna Charta, and so go on to such others as we had occasion to make use of, or may at present suit with our small beginnings. In the other column, we will set down the sum of such laws and customs as are in force and use in this jurisdiction, showing withal (where occasion serves) how they are warranted by our charter. As for those positive laws or statutes of England which have been from time to time established upon the basis of the common law, as they have been ordained upon occasions, so they have been alterable still upon like occasion, without hazarding or weakening the foundation, as the experience of many hundred years hath

given proof of. Therefore there is no necessity that our own positive laws (which are not fundamental) should be framed after the pattern of those of England; for there may be such different respects, as in one place may require alteration, and in the other not."<sup>1</sup>

Then follows, in lengthened columns, divers provisions of Magna Charta and the common law, on the one side, and the corresponding "Fundamentals of Massachusetts," on the other, showing their similarity.

To the same effect is the statement of Edward Winslow, in his "New England's Salamander Discovered," published in London, 1647, in answer to Dr. Child's "New England's Jonas cast up at London:"—

"As for the law of England, I honor it, and ever did, and yet know well that it was never intended for New England, neither by the Parliament, nor yet in the letters patents, we have for the exercise of government under the protection of this State; but all that is required of us in the making of our laws and ordinances, offices and officers, is to go as near the laws of England as may be:<sup>2</sup> which we punctually follow, so near as we can. . . .

"And however we follow the custom and practice of England so near as our condition will give way, yet as the garments of a grown man would rather oppress and stifle a child, if put upon him, than any way comfort or refresh him, being too heavy for him, so, have I often said, the laws of England, to take the body of them, are too unwieldy for our weak condition. Besides, there were some things supported by them which we came from thence to avoid; as the hierarchy, the cross in baptism, the holy days, the Book of Common Prayer," &c. . . .

"As for our trials between man and man, he knows we go by jury there as well as here. And in criminals and capitals we go by grand jury and petty jury. And where the death of any is sudden, violent, or uncertain, the crowner sits upon it by a quest, and returneth a verdict, &c., and all according to the commendable custom of England, whom we desire to follow. But their main objection is, that we have not penal laws exactly set down in all cases? 'Tis true, I confess, neither can they find any Commonwealth under heaven, or ever was, but some things were reserved to the discretion of the judges; and so it is with us, and no otherwise, our General Courts meeting together twice a year, at least, hitherto,

<sup>1</sup> Hutch. Coll. Papers, p. 199.

<sup>2</sup> Referring, it seems, to the charter of the Council at Plymouth, which granted to Bradford the charter of the Plymouth Colony.

for that very end, and so continuing so long as their occasions and the season will permit : and in case any misdemeanor befall where no penalty is set down, it is by solemn order left to the discretion of the bench, who, next to the Word of God, take the law of England for their precedent before all other whatsoever. And as I said before, if I would enter into particulars, I could here set down in a line parallel, as I received it,<sup>1</sup> in answer to the petition of Doctor Robert Child, &c., mentioned in their book, 'the fundamentals of the Massachusetts concurring with the privileges of Magna Charta and the common law of England at large.'"<sup>2</sup>

Chief-Justice Hutchinson, also, is a competent authority upon the point, that the first emigrants did not claim the common law as a part of their law, nor acknowledge it as having authority with them. In a charge to the grand jury, March term, 1767, he said,—

"I don't know a nation in the world, that makes the distinction between murder and manslaughter, which the English do. It was not made in this country before the charter [Province charter]; for our forefathers found their laws upon the law of Moses, which makes no such distinction."

In another charge, March term, 1768, while he repeats the statement—at that time, and since, quite common—respecting the introduction of the common law, he is even more explicit in his declaration, that the first emigrants did not consider themselves bound by it, and did not regard it as their law.

"Our ancestors, gentlemen, when they came over to this country, brought with them the common law of our mother country (which is with great propriety so called); and although their first charter bound them down to make no laws contrary to the law of England, yet, from the situation they were then in, and from their peculiar circumstances, they then apprehended they had a right to adopt the judicial laws of Moses which were given to the Israelites of old. They at that time considered, not how crimes affected the peace and harmony of society, but almost always adapted their punishment to the real guilt of the criminal. . . .

"Upon a judgment given against the old charter, the people could never obtain so great a boon, as they thought their old charter: since, you are sensible, they appointed all their officers, made all their laws, without any control from home. . . . We stand, therefore, upon quite a different

<sup>1</sup> He was agent for Massachusetts at the time.

<sup>2</sup> See Mass. Hist. Coll. 3d Series, vol. ii. pp. 127-140.

footing from our forefathers, and the principle of our laws is very variant from that which governed them under the old charter. There were several attempts made, since our present charter, to enact laws upon the old charter principles; but they all failed, and the laws were disallowed in Great Britain."

"The principle of law which now governs us, is to punish crimes, only as they affect society."<sup>1</sup>

But all this is not necessary to the support of my position, that the common law, and the statute law of England in amendment of the common law, were not the laws of the realm, contrary to which the colonists were to make no laws; for their power to pass statutes contrary to both, has been exercised without question ever since the common law has been recognized as in force in the Colony and in the Province; subject, after the Province charter, to the negative of the Crown, as provided in that instrument.

Chalmers interprets the restraint,—“You shall make no ordinances inconsistent with the connection between the territory and the country of which it is a member;” and says further, “so a colony may adopt new customs; may abrogate that part of the common law which is unsuitable to its new situation; may repeal the statute law wherein it is inapplicable to its condition. All it may change, except only the principles of its coalition with the State, or the special regulations of the supreme power, or great body-politic of the empire with regard to it.”—With this exposition of the clause of restraint, it would be quite unimportant whether or not the common and statute law of the realm extended over the Colony. Any law of the Colony inconsistent with either would abrogate or repeal it, without any violation of the clause of restraint.<sup>2</sup>

It may be said that the King was restrained by Magna Charta and the Petition of Right, as well in his colonial possessions, as in England itself.

The colonists were subject to the lawful legislation of the mother country; and so far as that legislation was extended over them by the force of the legislation itself, or by the legiti-

<sup>1</sup> Quincy's Mass. Reports, 1761-1772. Published 1865. Pages 235, 258-260.

<sup>2</sup> Chalmers's Annals, vol. i. p. 140.

mate power of the Crown, so far they could make no laws, civil or religious, in contravention of it. The navigation acts extended over them; and their legislation, contrary to those acts, was one of the allegations in the *scire facias*, on which the charter was vacated and cancelled. But it was held, that the *habeas corpus* act, passed 31st, Charles II., did not extend to the colonies, because they were not named in it.

After the clause authorizing legislation, follows a provision that the Governor and company "and all the chief commanders, captains, governors, and other officers and ministers" as should by said orders, laws, &c., from time to time be employed in the government of the said inhabitants and plantation, or in the way by sea thither or from thence, according to the nature and limits of their offices, —

"shall, from time to time, hereafter for ever," — "have full and absolute power and authority to correct, punish, pardon, govern, and rule all such the subjects of us, our heirs and successors, as shall from time to time adventure themselves in any voyage thither or from thence, or that shall at any time hereafter inhabit within the precincts and parts of New England aforesaid, according to the orders, laws, ordinances, instructions, and directions aforesaid, not being repugnant to the laws and statutes of our realm of England as aforesaid."

The power to pardon is conclusive evidence of a grant of political government, no such power being known in an ordinary corporation.

It hardly seems to be within the power of language, more completely to negative the idea that the charter constituted a corporation mainly for the purpose of trade and traffic; or, more clearly, to grant powers of legislation and government, whereby the inhabitants of the Colony might be "religiously, peaceably, and civilly governed."

Whatever Charles II. may have said about general liberty of conscience, of which he personally made a very large exhibition in some particulars, Charles I. and his ministers could not but form a reasonable judgment respecting the mode and manner in which the Colony would be religiously, as well as civilly, governed under his charter, whether he ever read it or not.

4. The charter authorized the exclusion of all persons whom the grantees and their associates should see fit to exclude from



settlement in the Colony; and the exclusion of those already settled, by banishment as a punishment for offences.

They were the owners of the soil; and, in the absence of conditions or limitations, the owner of such a title has an exclusive right of possession. They were the grantees of a charter of incorporation; and such grantees, unless there is some special provision or circumstance controlling them, may determine who shall be admitted to a participation in their corporate rights.

There was, here, nothing of condition or limitation in relation to their title to the territory; and their right to judge whom they would admit did not depend upon the general principle merely, but was express. They were to admit such persons as they thought fit, to be freemen.

Persons who came on their invitation, or through inducements held out by them, or with their consent in any way, could not in justice be sent away arbitrarily, or for any fancied dislike. In that respect they stood like other governments; and the proprietorship of the soil, which they held out for occupation and settlement, would not give them the right of removal as if such parties were trespassers. Coming by consent, and obeying the laws, they would be entitled to protection. But aside from considerations of this kind, the power of exclusion, on fair notice not to come, could not be made more perfect.

The King desired to limit their power of *admission*, so that persons especially obnoxious or dangerous to him, should not be harbored there, and he retained the power of exclusion to himself, by an express provision, which, however, was so limited that he could exclude only persons who were designated by name.

It has been supposed that the provision, that all subjects of the King and his successors who should go to, and inhabit within, the lands granted, should have and enjoy all liberties and immunities of free natural subjects, might be regarded as evidence of a restriction upon the right of exclusion by the grantees. But this cannot be maintained, for two reasons. — First, because this can be applied only to persons rightfully there, or going to, or returning from, the territory. It could not, of course, apply to any one whom the King had excluded by name from going there; and if there be this implied limitation upon it, in relation to persons excluded by the King, the same limitation must be

implied in regard to persons excluded by the colonial government, which, as we have just seen, aside from this provision, had, from its title, as perfect a power of exclusion as the King had by the clause for that purpose in his favor. It would be a gross violation of sound rules of construction, to say that this clause was a clause of protection to persons who had no lands, and no interest in the charter, and who were, moreover, prohibited from coming and remaining there, by the owners of the land and the grantees of the charter; for if it might so apply to *any*, it would apply to *all* who should go, and the right to the land and the corporate privileges would soon be rendered a nullity.—Second, this clause, rightly understood, is a limitation upon the royal authority, to the extent of its operation, and not upon the authority of the colonists. The King will not put persons out of the pale of English subjects,—deprive them of the privileges of English subjects,—because they go and inhabit there. They shall be Englishmen still. Let us see this a little more clearly, by a citation of the provision itself.

“And, further, our will and pleasure is, and we do hereby for us, our heirs and successors, ordain and declare, and grant to the said governor and company, and their successors, that all and every the subjects of us, our heirs or successors, which shall go to and inhabit within the said lands and premises hereby mentioned to be granted, and every of their children which shall happen to be born there, or on the seas in going thither, or returning from thence, shall have and enjoy all liberties and immunities of free and natural subjects within any of the dominions of us, our heirs or successors, to all intents, constructions, and purposes whatsoever, as if they and every of them were born within the realm of England.”

You perceive that it is confined to *subjects*, and does not include strangers. It provides that these subjects, and their children born there or on the passage to and from, shall have the liberties and immunities of free natural subjects within any of the King's dominions, as if they were born within the realm. What were the liberties and immunities of such subjects? Certainly, not to go and inhabit the crown lands against the will of the King, or any lands which the King had granted, against the will of the persons to whom the grant had been made. Certainly, not to intrude themselves into any corporate rights which had been granted to others. Persons who should go and inhabit lawfully,

should have the general rights of Englishmen as secured by "Magna Charta," and the customs of the realm. But this did not exempt them from any legislation, otherwise lawful, under the charter.

5. The charter authorized the creation and erection of courts of judicature to hear, try, and determine causes, and to render final judgments and cause execution to be done, without any appeal to the courts of England, or any supervisory power of such courts.

To the express provision authorizing the establishment of all manner of wholesome laws, statutes, and ordinances, for settling the forms and ceremonies of government and magistracy, fit and necessary for the Plantation, — for the settling of all sorts of officers which they shall find needful for that government and Plantation, and for setting forth their several duties and powers, — and also to that giving full and absolute power and authority to correct, punish, pardon, govern, and rule, I have already referred.

There is no provision in the charter for any original jurisdiction of the courts of England, over the Colony, nor for an appeal, in any shape, to those courts. And there was no custom of the realm, no common law, which gave any such jurisdiction. If it were supposed that the King had power to confer jurisdiction upon the courts of England, original jurisdiction in those courts would have been a denial of justice. And an appellate jurisdiction, afterwards deemed oppressive in the days of the Province, would, in the infancy of the settlement, have been next to impossible. The fact that there was no service of the writ, *quo warranto*, in 1635, within the Colony, shows very clearly that it was understood that process did not run there.

The Lords Commissioners seem to have been careful not to attempt a regular service of their orders within the Colony. They were sent in letters from Mr. Meautis, their clerk, and from Mr. Cradock, to the Governor.

Hutchinson, in stating the proceedings in 1691, when the grant of a Province charter was under consideration, remarks, —

"By the old charter, it was said, they had power to imprison or inflict punishment, in criminal cases, according to the course of corporations in England, but that, unless capital cases be expressly mentioned, the power

would not reach them; that no power was given to erect judicatories, or courts for probate of wills, or with admiralty jurisdiction, nor any power to constitute a house of deputies or representatives, nor to impose taxes on the inhabitants, nor to incorporate towns, colleges, schools, &c., which powers and privileges had been, notwithstanding, usurped.”<sup>1</sup>

But this construction, limiting all the powers under the charter, “according to the course of corporations in England,” is utterly unwarrantable. That expression occurs but once in the charter, and follows immediately after a provision in relation to elections. If it is not confined to “fines, mulcts,” &c., in relation to that subject, no reasonable construction can extend it to other provisions which I have cited. It would be absolutely impossible to govern a colony in America, according to the course of corporations in England constituted for trading or even for municipal purposes.

Hutchinson inserts in a note the opinion of Mr. Hook, who was consulted by Hampden in relation to the Province charter, among other things, that the grantees under the old charter had “no power to keep a prerogative court, prove wills, &c.; nor to erect courts of judicature, especially chancery courts.”<sup>2</sup> This is very astonishing, unless we suppose that Mr. Hook, in considering the express powers which should be inserted in the new charter, accepted the objections which had been made to the old, by Gardiner and others, without any critical examination. Certainly, the old charter was intended to be complete for its purposes. No addition was contemplated to be made, either by King or Parliament. How were the people to be civilly and peaceably governed, without courts? Was the power to punish and pardon to be exercised without any judgment of conviction? What is meant by the power granted to make laws, “as well for settling of the forms and ceremonies of government and *magistracy*, fit and necessary for the said plantation,” — “and for naming and settling of *all sorts of officers*, both superior and inferior, which they shall find needful for that government and plantation”? The idea of a colony to be settled and governed without courts would be preposterous.

It would seem, therefore, that the propositions which I have stated are fully sustained without any resort to the express pro-

<sup>1</sup> Hutch. Hist., vol. i. p. 415.

<sup>2</sup> *Ib.*, p. 111.

vision in the charter, which embodies a general principle of law now well understood and applied in cases of doubt, to deeds of private persons, that the charter should be construed, reputed, and adjudged in all cases most favorably for the benefit and behoof of the grantees.

If any thing were needed to fortify the foregoing positions, it may be found in the fact, that, in the process and proceedings in the latter part of the reign of Charles II. to enforce a forfeiture of the charter, or to annul it, there was no allegation of a usurpation of power in any of these particulars; nor any alleged grounds of forfeiture founded upon either of them.

The causes of forfeiture, as set forth in the Court of Chancery, were, that the Governor and company assuming on themselves, under color of their letters patent, power to assemble to make good and wholesome laws and ordinances, not repugnant to the laws of England, but respecting only their own private gain and profit, assumed the unlawful and unjust power to levy money of the subjects of the King, and, in prosecution of that power, made laws for levying poll taxes, and duties on merchandise and tonnage; that they had passed a law providing for a mint, and the coining of money; and another, requiring an oath of fidelity to the government of the Colony.<sup>1</sup>

Undoubtedly, the absence of other allegations of abuse of power under the charter is not conclusive evidence of a belief on the part of the crown lawyers, that there were none others which could be sustained; but there is no good reason why more should not have been enumerated, if it was supposed that others of a grave character existed, and a transfer of the charter and government, or an exclusion of his majesty's roystering subjects from inhabitancy, or any religious legislation whatever, if supposed to be unlawful, would hardly have been omitted.

I have no means at hand to determine with certainty, why this process was instituted in the Court of Chancery, which, ordinarily, has no jurisdiction of proceedings *quo warranto*, and

<sup>1</sup> The power to coin money being, at that time, not an ordinary legislative power, but one of the King's prerogatives, the value of unusual pieces to be ascertained by proclamation, it might well be held that the charter did not confer it. And some of the legislation of the Colony may have been contrary to the navigation acts of the realm. To that extent, the complaints seem to have been well founded; perhaps somewhat further.

relieves against, rather than enforces, forfeitures. In a "Brief Relation of the Plantation of New England," by an unknown author, written at London, in 1689, it is stated, —

"that, in the year 1683, a *quo warranto* was issued out against them," — that "the Governor and company appointed an attorney to appear and answer to the *quo warranto*, in the Court of King's Bench. The prosecutors not being able to make any thing of it there, a new suit was begun by a *scire facias* in the Court of Chancery."<sup>1</sup>

Chalmers says of the *quo warranto*, "Randolph's was the ominous hand which carried it across the Atlantic. And to give weight to the messenger who, in Massachusetts, had little in himself, and to the proceeding, which was equally obnoxious, a frigate was ordered to transport him thither." He says further, "After a variety of obstructions, arising from the distance, the novelty, and real difficulty of the business, a judgment was given for the King by the high Court of Chancery in Trinity term, 1684, against the Governor and company in Massachusetts, that their letters patents, and the enrolment thereof, be cancelled."

The validity of the proceedings was afterwards "questioned by very great authority."<sup>2</sup>

The reason why the prosecutors could not make any thing of it in the King's Bench may have been that suggested in relation to the former writ, that, as the process of the court did not run into the Colony, there could be no service there.<sup>3</sup> It may have been that the writ did not issue against "the Governor and company." The colonists instructed counsel to take that exception. But if that was the main objection, it might readily have been obviated by the issue of another writ. If so issued, however, it would have been an admission of the existence of the corporation, which was challenged by the allegations of usurpation in the process in 1635.

It may be conjectured that the *scire facias* was brought in Chancery on the ground, that chancery might annul the charter, though out of its jurisdiction, on the same principle that it now sometimes compels a man within its jurisdiction to give a

<sup>1</sup> Mass. Hist. Coll. 3d Series, vol. i. p. 96      <sup>2</sup> Annals, vol. i. pp. 414, 415.

<sup>3</sup> "The sheriff's" [of Middlesex, England] "principal objection why he did not return a summons was, the notice was given after the return was past. He did also make it a question whether he could take notice of New England, being out of his bailiwick." — Letter of Attorney-General Sawyer. See Palfrey's Hist. New England, vol. iii. p. 891, note.

deed transferring a title to lands lying within another government. But the cases are not alike.

No judgment of forfeiture was entered, nor any decree ordering any person to bring in and surrender the charter, or to do any other act in relation to it. The court adjudged, that the letters patent, "and the enrolment thereof, be vacated, cancelled, and annihilated, and into the said court restored, there to be cancelled;" but there was no attempt to enforce the latter part of the decree.

The proceedings may have been instituted in that court, upon the ground of an ancient jurisdiction of the chancellor to repeal grants of the King, which had been issued improvidently. But the assumption to enter a decree, that a charter granting lands, and corporate powers, and powers of government, and which had existed more than half a century, should "be vacated, cancelled, and annihilated," on account of usurpations, which, in case of ordinary corporations, may be a subject for proceedings by writ of *quo warranto* in the King's Bench,—and especially to do this upon a writ issued to the sheriff of Middlesex, in England, under such circumstances that there could be neither service nor notice,—would be of itself a usurpation. And this seems to be its true character, whatever might be the reason alleged.

If the colonial government was exercising power inconsistent with the charter, or with colonial dependence, the true remedy would at this day appear to have been, not by process to enforce a forfeiture, or to vacate the charter, which, if effective, would leave the inhabitants without any legal government; but by an enforcement or amendment of the charter, in regard to its public powers and character, by the Crown, from which it was derived, or by an act of Parliament making the requisite provision for that purpose.

The better opinion may be, that meeting with technical difficulties in the court of law, resort was had to Chancery, *because of a better assurance of speedy success*.<sup>1</sup>

The proceeding appears to have been no more effective in its character, than might have been a judgment of seizure, in a process at law; and, in fact, little better than would have been an order of the King in Council, that the charter was forfeited, with a revocation of its powers. However, the decree an-

<sup>1</sup> See Palf. Hist., vol. iii. 391-394.

swered its purpose. The colonists were not in a situation to contest it.<sup>1</sup>

Certain differences between this charter and the charter of the Council established at Plymouth in the county of Devon, have already been considered.

It may be noticed farther, as fortifying the position, that the powers granted in the charter of Charles included a power of exclusion, that the Great Patent to the Council provided, expressly, that the territories granted should not be visited, frequented, or traded unto, by any other of the King's subjects, with a provision prohibiting all the King's subjects from visiting or trading there, unless it be with the license and consent of the Council, upon pain of the King's indignation, and imprisonment of their bodies during his pleasure, with forfeiture besides. And the King condescended and granted, that he would not grant any liberty or license to any person to sail, trade, or traffic there, without the good-will and liking of the Council.

The provisions of the charter of Charles were so comprehensive that there was no necessity for such express exclusions.

A comparison of the provisions of the charter, with the subsequent proceedings of the Puritans, relieves them from the charges which have been so persistently urged against them.

It has been said, that "the charter did not include any clause providing for the free exercise of religion, or the rights of conscience." But this is a mistake. It is true that there is not, in express terms, any such provision. It would have been most surprising, if the King had made proclamation of any such liberty, by a formal grant. But the power of legislation, which included the power to legislate on religious matters, was as plenary for that purpose, as an express grant would have been. The "letter from King Charles II. to Massachusetts," in 1662, asserts that "the principle and foundation of that charter was, and is, the freedom of liberty of conscience."<sup>2</sup> And a letter prepared for the royal signature, by the lords of the committee for plantations, in October, 1681, not only recites that the charter granted "such powers and authorities as were thought

<sup>1</sup> See the Exemplification of the judgment. *Mass. Hist. Coll.*, 4th Series, vol. ii. p. 246.

<sup>2</sup> *Hutch. Coll. Papers*, vol. i. p. 378.



necessary for the better government of our subjects, at so remote a distance from this our kingdom ;” but adds, “ nothing was denied, which you then deemed requisite for the full enjoyment of your property, and the *liberty of your conscience*, so you would always contain yourselves within that duty which the bonds of inseparable allegiance bind you to.”<sup>1</sup>

They did not come here to establish or provide for any general liberty of conscience. In his very full and complete exposition of this fact, the reverend and learned gentleman with whom I am associated, Dr. Ellis, stated that they placed a restraint — the restraint of the Bible — upon *their own* liberty of conscience. This depends upon the signification which we give to the term conscience, which, as you know, is sometimes used to designate the faculty by which we have ideas of right and wrong in reference to actions, without regard to, and perhaps in ignorance of, the precepts of the Bible, occasionally called natural conscience ; and it is sometimes used to designate the same faculty, instructed in the Bible, receiving it as the word of God, by which to test right and wrong, incorporating its restraints into, and making them part of itself, — not unfrequently termed an educated or enlightened conscience. In the former signification, which is plainly the sense in which Dr. Ellis uses the word, the Puritans did not seek to establish liberty of conscience even for themselves.

The charter in giving power to make orders, laws, &c., for directing, ruling, and disposing of all other matters and things, by which the inhabitants might be religiously governed, clearly contemplated government in matters of religion ; and government in matters of religion, in those days, meant any thing other than liberty for every man to do what his notion of right and wrong dictated in that matter. The grantees meant and understood it, as government according to the laws of the Bible. In the other sense of the term, conscience, that is, the faculty of distinguishing between right and wrong, instructed by the Bible, and according to its precepts, as they understood them, — liberty of conscience for themselves was precisely what they intended to secure. In other words, their great object was to secure for themselves and those who, with their principles, should associate

<sup>1</sup> Chalmers, vol. i. p. 444.

with them, the liberty to worship God according to the dictates of their own consciences, — enlightened by the Bible.

The key to their enterprise, as thus presented, unlocks the repository of their ends and aims, intents and purposes; and you have the explanation and the justification of their religious legislation.

They founded a civil State, upon a basis which should support the worship of God according to their conscientious convictions of duty; and an ecclesiastical State, combined with it, which should sustain, and be in harmony with, the civil government; excluding what was antagonistic to the welfare of either.

Some one may inquire, If such was the design of the Puritan Fathers in the establishment of their government here, why was it not more distinctly stated and proclaimed at the time, leaving no room for misconception afterwards? The ready answer is, that, if a public development of all their purposes had been made, there might have been danger of some measures to defeat their designs, and to extinguish their hopes. The King and his ministers must have known the general character of the enterprise. There was no necessity that there should be a public proclamation of their intentions beyond what was made. It is sufficient that there was no stratagem and no deception in the matter. Doubtless, as the enterprise proceeded, some measures were adopted, which were not originally contemplated.

Is it asked, How it is possible that the Puritan Fathers, who were not recluses, but many of them men of education, — men of great intelligence in their day, — men mixing with the world, — could entertain the idea of establishing a Commonwealth, where religion should outwardly be brought to a rigorous test of uniformity, when they themselves were non-conformists to the Church of England?

It may quite as well be asked, Why, with their deep religious convictions, they should have had any doubts of success? Theirs was a religious as well as a civil State. The Jewish government, which was their pattern so far as it might be applicable, existed for ages. The Papacy had, for centuries, claimed the implicit reception of its dogmas, and unhesitating obedience to its mandates. The Reformation denied the infallibility of the Church of Rome, and exposed its errors; but the political govern-

ment of England, as soon as it gave support to it, exercised a similar right of requiring conformity to the new doctrines, and the established ordinances. The Puritans loathed the corruptions of the Hierarchy, and sought for purity of doctrine and simplicity of worship. They had unwavering faith that God would regard their enterprise,—their government,—and their Church, in its unhesitating reception of His revealed truth, in its sincere desire to learn His will, and do what was pleasing in His sight, in its simple forms of adoration and worship,—with especial favor. Why should they not, in the full assurance of that faith, devoutly believe that God Himself had not only opened to them a way of escape from impending persecution; but that He had reserved this wilderness to that time, as the place for the establishment of that faith and that worship on an enduring foundation? In point of fact, the government which they established, did last for more than one generation, on the distinctive principles of their foundation; and left its impress on the future, in a more wide-spread liberty, not only for our day, but for after ages.

With the design and purpose by which they were actuated, with the deep conviction of the truth of their principles, of the importance of their enterprise, of the sacredness of the trust committed to them, and of their duty to use all lawful means to secure its success,—all their legislation may be said to have been religious legislation. They legislated in the fear of God, and with a profound sense of their responsibility to Him; which is more than can be said of the greater portion of the legislation at the present day.

If, however, we take a more restricted signification, it may well be maintained that all their legislation, which had a direct tendency to aid in the accomplishment of their great purpose to build up a true Church and a righteous State, each supporting the other, was religious legislation. All the legislation for the enforcement of good morals, of good order in the community, was in aid of this great object, and therefore in subservience to religion.

More especially may the legal provisions for the promotion of education be regarded as of that character. One great purpose of their polity was to raise up a diligent and faithful

ministry; and the college which they founded, and to which our present Massachusetts turns with such pride, had that for one of its objects.

It is, however, of the legislation having a more direct bearing upon the interests of religion, that I am to speak. We know from the character of their enterprise, what it must have been. We know from their records, what it was.

Of course, it had reference, in the first instance, to the support of the ministers who were settled over the different churches; who were participators in the hardships, hopes, and labors of the enterprise, and contributed so largely to its success.

At the first court, held Aug. 23, 1630: "*Impr.*, it was propounded how the ministers should be maintained."

"Mr. Wilson and Mr. Phillips only propounded. It was ordered that houses be built for them at the public charge. Sir Richard Saltonstall undertook to see it done at his plantation for Mr. Phillips, and Mr. Governor at the other plantation for Mr. Wilson. It was propounded what should be their present maintenance. After specifying the quantity of meat, malt, money, &c., it is added, 'all this to be at the common charge, those of Mattapan and Salem only excepted.'"<sup>1</sup>

Benedict, in his History of the Baptists, page 368, speaks of this, as "the first dangerous act performed by the rulers of this incipient government, which led to innumerable evils, hardships, and privations to all who had the misfortune to dissent from the ruling powers, in after times." And again, he says, "This was the *viper* in *embryo*; here was an importation and establishment, in the outset of the settlement, of the odious doctrine of Church and State, which had thrown Europe into confusion, had caused rivers of blood to be shed, had crowded prisons with innocent victims, and had driven the Pilgrims [he means Puritans] themselves, who were now engaged in this mistaken legislation, from all that was dear in their native homes."

This is certainly very unwarrantable language, in reference to the subject-matter. Whatever we may think, or say, of subsequent events, it is a grievous misuse of the vocabulary, to term this a "dangerous act," and a "*viper* in *embryo*." On the contrary, it was the most natural, consistent, and just proceeding that could be imagined.

<sup>1</sup> Mass. Records, vol. i. p. 78.

The people who adopted this measure were a small company, who had come here with their families, their religious teachers, and their household goods, to form a settlement. We will leave out of our consideration here, their expatriation, their desire to enjoy the worship of God unmolested, and their sacrifices for the accomplishment of their purposes. They were religious persons, deeply impressed with the importance of supporting the institutions of religion. They revered their teachers, looked to their wisdom for advice in temporal as well as spiritual things, and were bound to provide for them a support. If they had not done so, they would have been worse than the infidels. What more just, what less exceptionable, measure could they have adopted, than to assess, in such manner as to them seemed best, a tax upon themselves for that purpose? If they were content, there were no others who should object.

We have, I think, in the character thus ascribed by this historian to this simple and just provision for the support of their religious teachers, the key to the difficulties which afterwards arose between them and others, who, with different religious views, instead of founding other settlements in the wilderness, where they could enjoy *their* liberty of conscience, after their own modes and forms, chose rather to claim a right to participate in the privileges of the Puritans, at the same time that they placed themselves in a very obnoxious antagonism to some of their most cherished principles. They intruded themselves into the Puritan Commonwealth, set up their standard of opposition to the principles and laws which they found there, and then complained, because the Puritans were not inclined to change their laws for the especial accommodation of their antagonists.

I will consider this measure, as it developed itself afterwards, when I come to the question of their right of exclusion, and the manner in which they exercised it; my object being, just now, to rescue this first act of religious legislation from the viperous metaphor, which, without sufficient provocation, attempts to fasten its fangs into it.

One of the chief accusations against the Puritans, — perhaps the greatest of all, — one which comes with a curl of the lip, or a toss of the head, or some other significant manifestation to make it emphatic, arises out of the connection of their

churches with the politics of the State,—a union of Church and State, as it has been called. At an early day, they passed a law by which none but church-members were to be admitted as freemen, so that the right of voting in the affairs of the company, and of the government, as established by and in the corporate body,—the right of suffrage,—was confined to persons who were members of the Church.

Persons who care very little how many Quakers and Ranters were hung, are very sensitive respecting the safeguards with which the Puritans surrounded the ballot-box. Had they not some reason for the adoption of a sure rule?

Dr. Ellis, in his first lecture, stated that there is not in Boston, at the present day, any conceit, notion, fancy, or opinion, which did not exist soon after the settlement of Massachusetts; but I doubt, whether, among all the mischievous persons and all the preposterous notions of that day, there were any persons who maintained that there was such a thing as a *natural right of suffrage*; that is, a right *by nature*, in every body, to participate in the government of all others, as well as of themselves; that being the character of suffrage in a republican government. If there were any such, certainly the Puritans were not of their community.

Well, undoubtedly, we should not select church-membership as a criterion by which to determine who should have the right of suffrage at the present day. It behooves us, however, to be very careful that we do not adopt something much worse.

The law itself is in these words, "*To the end the body of the freemen may be preserved of honest and good men* : It is ordered, That henceforth no man shall be admitted to the freedom of this Commonwealth but such as are members of some of the Churches within the limits of this jurisdiction."

Can we lay our hands upon our hearts, and say, that all our laws regulating suffrage have as wise and honest an object and purpose as that disclosed in this enactment?

Why should the enlightened people of this day and generation denounce or censure the Puritans, because they regulated the right to participate in the government which they founded upon that basis?—upon a basis which, in their estimation, gave the suffrage to honest and good men,—exceptions, of course.

Thank God, being a church-member is not evidence that a person has a *bad* character, even in New York; although there may be exceptions which serve to show that such membership is not *conclusive* evidence of a good character, even in Massachusetts.

Had not the Puritans the legal right to limit participation in their government, in that manner? Was it morally wrong in them to do so? Was it unjust? Was it inexpedient? Unless we can answer some one, at least, of these questions emphatically in the affirmative, we convict ourselves, and not the Puritan Fathers, when we set ourselves up as censors, and condemn their legislation.

As to the legal right, in the first place! If the exposition which has been given of the provisions of the charter has been satisfactory, I need not add any thing upon this subject. Nothing can be more clear than their right to judge and determine whom they would admit to the participation of the privileges under their charter. They were expressly authorized to admit freemen; they were not to admit all comers. They must exercise a right of selection in some manner.

Was it morally wrong to adopt their principle of selection? With a concession of the principle that all rightful government should be for the greatest good of the community over which it is exercised, and that in a republican State, the question what measures will produce the greatest good must be determined by the majority of voices having the right of decision, I think I might venture the proposition, that any rule of suffrage which such majority should conscientiously determine to adopt, as that best calculated to promote the welfare of the whole, whatever else might be thought of it, could not be censured as morally wrong. But some enthusiastic advocate of universal suffrage might, perhaps, wish to be heard on that proposition; so we will confine ourselves to the Puritan Commonwealth.

Was it morally wrong in the grantees of the charter to determine, that the greatest good of their organization would be best promoted by a limitation of that character? I certainly do not suppose, that any one who has a reasonable sense respecting moral right and wrong, will be disposed to argue that question with me.

They profess to have done it, "to the end the body of freemen may be preserved of honest and good men." They are, at least, entitled to the credit of the motive on which they professed to act until that motive be disproved, and there is not the first particle of proof that they were not actuated by it. Admit that this rule did not assure to them the association of all the good and honest men in the community. Will any of you tell me what criterion they should have adopted, in their circumstances, which would have given higher assurance of the accomplishment of the worthy end which they proposed to themselves? If I should pause for a reply, I think none would be forthcoming.

Was this rule unjust? Who at that day should impeach it on this score? It was made by the grantees of a charter, and those whom they had admitted as associates, prescribing for themselves a limitation on which alone they would admit other associates.

The charter was, as we have seen, in form, and partly in fact, an act incorporating a company to which a large grant of land had been made, and to which was given the power to purchase and hold property, and the power also to plant and govern a colony upon the territory thus granted. The charter gave them expressly, what at this day follows as a corporate right, without any express words, the right to admit whom they pleased as freemen of the corporation; that is, as associates entitled to a participation in all their rights and privileges equally with themselves. They might have required a price for the privilege of an ownership in the lands and a participation in the franchise of the corporation, if they had thought proper. But money was no part of their object in the admission of freemen, or in voting for officers. They had not even arrived at that knowledge of the science of government which teaches that legislators may sell their votes in a caucus for the nomination of candidates for an office to which they hold the power of election, and then say that there was no bribery in that, because the nomination of the caucus was not an election. They might have required any other condition of membership which to them seemed just and right. Under these circumstances, who should advance a claim to thrust himself into a participation of their rights and privileges? The question answers itself. No one, unless he could say, that they



had held out to him a prospect of participation, and then refused it. No one said that this had been done, even by implication. The rule was adopted very soon after the settlement, and was known and understood. If there was any such individual case, it would not affect the principle.

Was the rule inexpedient? — is the remaining question. We might inquire here, on what principle of right it is that we are to judge and condemn them upon such a question. We may judge and express our opinion whether they acted wisely for their own interests, without assuming to censure them for their judgment respecting a matter which, as it was then presented, was one affecting their rights, property, and duties. — But let us try this question also. In considering the three preceding questions, I have treated them mainly as questions of right and of business in relation to a civil corporation. This presents itself in the same aspect; but we must also take into consideration the religious character of the enterprise.

And here there seems to be no possible room for doubt. It is true that it offered some temptation to persons to join the Church from sinister motives. Few persons, however, would venture, for secular reasons, to enter the pale of a church so strict in its observances; and the sure support which the churches would receive from the legislation of a General Court composed of their own members, would greatly overbalance any danger from hypocritical members.

This restriction of the privilege of freemen to persons who were members of the churches, is not to be regarded as evidence of intolerance or bigotry. Of itself, it required no profession of faith, — no creed.

For the purpose of admission to a church, a person must have assented to the creed of that church very much as at the present day, so far as the Church has a creed. And so, through the operation of this rule, any person who was admitted to the privileges of a freeman, must have given his assent to the creed. But this assent to the creed, merely, was not the reason why he was admitted to the franchise. Somewhat more than assent to the creed was required, in order to admission to the Church. The candidate must be a person of good character, honest, and of a blameless life. It was to secure a body of men, of such a

character, that this rule was adopted. And, moreover, church-membership was not of itself the sole qualification.

The Plymouth Colony undertook to secure the same result in a different mode. It was enacted there, that the deputies should propound candidates to the court, being such as have been also approved by the freemen of the town where such persons live. Then it was required that they be propounded at a June court, and stand propounded one whole year. And in the Revision of the Laws of that Colony in 1671, we find that none should be admitted as freemen but such as were, at least, twenty-one years of age, had the testimony of their neighbors that they are of sober and peaceable conversation, orthodox in the fundamentals of religion, with twenty pounds ratable estate, and to stand propounded a year, unless it was some person well known, or of whom the court might make present improvement.<sup>1</sup>

Which would best satisfy the candidate for suffrage at the present day,—the Puritan, or Pilgrim rule,—Massachusetts, or Plymouth?—more especially when there was another law of Plymouth by which freemen might be disfranchised,—a provision which, if it existed at the present day, and were enforced, would cause a great exodus among the voters.—Even Rhode Island would not admit persons whom they considered turbulent and unruly, to ownership, or to exercise the privileges of freemen.

Of itself, the rule did not prohibit immigration into the Colony. Whoever chose might come, notwithstanding the adoption of this rule. Persons ambitious of participating in the government might be influenced by it not to come; but it would be their ambition which prevented them in such case. Persons might not desire to live under a government, with a religious legislation such as might be expected from such legislators; but it would be the desire for a larger license which prevented them. The rule itself might be the remote cause; but another, operating more directly upon them, would intervene, and a maxim of the law teaches us to look to the near, and not to remote, causes, as the ground for complaint, if there be any. The rule denied to no one a participation in the protection which the government offered to persons and property.

<sup>1</sup> *Plym. Col. Laws* (Ed. 1836), p. 258.

But, still farther, all the alteration which Charles II., or his ministers, required, in respect to the right of suffrage, when, in 1662, he or they undertook to regulate the affairs of the Colony was, that "all the *freeholders*, of *competent estates*, not *vicious* in *conversation*, and *orthodox* in *religion* (though of different persuasions in church government) may have their votes in the election of all officers, civil and military."<sup>1</sup> Would this rule satisfy us better than church-membership? The duty of making up the list of voters, on this basis, would not be an enviable one, at this day; and an action for exclusion from the list might open a wide field of inquiry.

The laws having for their object the conversion of the Indians to Christianity, were part and parcel of the religious legislation of the Colony.

The laws for the observance of the Lord's day were very strict, and provision was early made for instructing the Indians on that subject.

There were penalties for neglecting the worship of the churches, disturbing the order thereof, and for reproaching the ordinances.

The law against *Heresy* provided, that "if any *Christian* within this jurisdiction shall go about to subvert and destroy the Christian faith and religion, by broaching and maintaining any damnable heresies," of which there followed a very respectable catalogue, commencing with, "denying the immortality of the soul," "every such person continuing obstinate therein, after due means of conviction, shall be sentenced to banishment."

Persons above sixteen years of age professing the Christian religion, might be punished for denying the inspiration of any of the books of the Old and New Testaments.

But the introduction to the law against Heresy disclaimed all power over the faith and consciences of men.

And in the proceedings respecting the celebrated Cambridge Platform, the General Court declared that they could not see light to impose any forms, as a binding rule, but gave their testimony to it.

The Antinomian controversy was not merely a difference of opinion upon a speculative doctrinal question, but an open attack upon what was regarded as sound doctrine, in such a manner as

<sup>1</sup> Hutch. Coll. Papers, p. 379.

to cause a commotion in the State, as is shown by the disarming of the followers of Wheelwright; a measure which would not have been resorted to, but in fear of an outbreak.

Another part of the religious legislation of the Puritans, upon which much vituperation has been expended, and many sneers wasted, is that regarding witchcraft.

Are we all quite sure, that there was actually no witchcraft in the days of the Puritans?

We have, at this day, not only our rappings and tippings, our rope-tyings and our planchettes, but we summon spirits from the vasty deep, and, unlike those of Hotspur, they do come, bringing with them communications from the spirit-world, which must give us a very poor idea of heaven, if we suppose them to have come from that quarter.

Is not the difference between this age and the former mainly in the fact, that witchcraft with us does not come on accusation; but that our witches volunteer their manifestations, are quite willing to display their powers, and are thus far more kindly disposed than their predecessors, not having, as yet, taken to sticking pins into people?

For my own part, my imagination could just as easily mount an old woman on a broomstick, and set her careering through infinite space, as it could get up a conversation with General Washington about fly-traps, or with John Adams on the respective merits of hair-dyes, or some other subject of even less significance. And when I give credence to all the supernaturals of our present time, I intend to believe also, unreservedly, in the Salem witchcraft!

But, suppose we hold a little longer to the belief that the witchcraft of the former time was trickery and delusion; upon what sound basis are we to single out the Puritans for condemnation?

The legislation of the Puritans in regard to witchcraft was but the legislation of the age in which they lived, and with their respect for the Jewish law, they, of all people, must have had such legislation.

In England, the law against witchcraft was enforced with as little doubt of its existence, and of its being a proper object of criminal cognizance, as prevailed in Massachusetts; and the executions there were much more numerous.

Even the Plymouth Colony had its legislation against it; and if the witches had not thought that that small community offered too limited a field in which to exercise their vocation, I know no reason for believing that the good people there would not have enforced their laws against them. How should they have done otherwise?

Only a small portion of the people of Massachusetts, however, had any active participation in the prosecutions, and many made grave objections to them.

The General Court appointed a special court for the trials; and one at least of the judges of this court, and several of the justices, were much dissatisfied with the proceedings.<sup>1</sup> Of the majority of the judges who were present, it may be said, that they had the belief in witchcraft, which that most eminent and upright judge, Sir Matthew Hale, entertained as firmly as they did; and that they had quite as much evidence as was introduced in cases before him, in which he was instrumental in procuring convictions, on which he gave sentence of death, with a conscientious belief that he was doing good service to God and the State. He seems not to have wavered in this belief, to the day of his death.

It has been suggested, that there was one physician in Massachusetts who, if his life had been spared, might, either by his professional skill or by his wise counsels, have done something to prevent or stay this lamentable delusion. It is a subject of profound regret that he should have died a year before his labors would have been so exceedingly useful. Those who were living "gave countenance and currency to the idea of witchcraft in the public mind, and were very generally in the habit, when a patient did not do well under their prescriptions, of getting rid of all difficulty by saying that 'an evil hand' was upon him."<sup>2</sup> Very convenient, indeed!

Roman Catholic priests and Jesuits were forbidden to come within the jurisdiction.

The right of the colonial government to exclude persons actually settled in the Colony, existed from the power to make

<sup>1</sup> Thomas Brattle's Letter, Mass. Hist. Coll., 1st Series, vol. v. p. 75. Bentley's Description of Salem, ib., vol. vi. p. 266.

<sup>2</sup> Upham's Witchcraft at Salem Village, vol. ii. p. 361.

laws, constitute courts and magistrates, and punish offences. Banishment was a recognized mode of punishment; and this was their common penalty for grave offences against their religious polity. It was peculiarly adapted to a Commonwealth which was to be governed on religious principles, and to suppress the promulgation of religious doctrines inimical to its welfare. The Puritans desired to remove the disturbers of their peace; and many, if not most of these, were religious controversialists.

Difficulties, which ended in sentence of banishment, for offences against their religious legislation, arose in various ways.

You will not be shocked, I trust, if I venture the supposition that there is nothing in the whole world on which conscience is so sensitive, or by which it is so grievously violated, as the compulsory payment of money to be appropriated towards any thing connected with religion.

A man pays taxes, which he knows will be appropriated to the support of an unrighteous war for the acquisition of territory belonging to the Indians, or to some weaker nation; for wasteful expenditure on public buildings, or corrupt purchases for the benefit of contractors, or for the transportation of patent medicines in the mail under the franks of members of Congress,—he shrugs his shoulders, but his conscience is quiet. Let him understand, however, that his tax is appropriated to the support of a minister of the gospel, who preaches some doctrine to which he does not assent,—be the difference but

“the division of the twentieth part

Of one poor scruple,—nay if the scale do turn

But in the estimation of a hair,”—

his conscience immediately takes the alarm, and he becomes the subject of persecution.

The Puritans being satisfied with the mode of supporting ministers by a tax, which we have seen was originally adopted at the first meeting of the Court of Assistants in the Colony, continued it by subsequent enactments. All inhabitants were assessed, proportionably to all charges in Church and Commonwealth. If all the inhabitants had been as closely united in their religious sympathies as were the first emigrants, there could have been no objection to this, at least none of a conscientious character. But this was impossible in the nature

of things. Other emigrants came, with different tenets. It was, of course, impracticable to exclude all such, however great the caution might have been. Change of opinion must, also, have caused more or less of dissent. Difference of views caused opposition to the tax. The government disclaimed any right to interfere with the consciences of men, but insisted upon obedience to the law as a civil duty. The recusants denied the authority of the magistracy to enforce the commands of the first table, and made speeches against it. The magistrates alleged that this was not only unsound in doctrine, but endangered the authority of the civil State. The recusants preached. The magistrates banished. The recusants insisted that they were persecuted for their principles. The magistrates averred that they were punished for their practices.

Two questions may arise here. First, — Whether this was a tax for the support of religious doctrines, or one for the support of the civil State through the agency of religious teaching. If the first, then, by its enforced collection, conscience was violated. If the latter, then, by a refusal of payment, a rightful civil law was defied. Second, — Whether the speeches which were made, were the dictates of conscience, which required a testimony of that character against the enormities of the law, — or the utterances of the mere human will, determined to gratify its own willfulness, and, if possible, to retain the money in its own pocket.

These questions, as the lawyers would say, may be regarded as exceedingly nice, — questions about which men may argue; and, like the village schoolmaster, "e'en though vanquished," they may "argue still."

As I am not one of those who can

"distinguish and divide

A hair, 'twixt south and south-west side,"

I must leave it to the casuists of the next two centuries to determine whether or not the institutions of religion may be such a support to the civil State, that a tax, by the State, to sustain them, can be regarded as a mere civil regulation, violating no man's conscience, even if the money be applied to the maintenance of teachers who differ from him, — whether or not the religious doctrine and the civil support may be regarded as so far distinct, that the civil magistrate may tax on the ground of

the civil right, and the party pay without interference with the religious right. Whatever opinions may be entertained, the Puritans, I think, took, substantially, that distinction, and their rule, thus stated, survived the Colony, lived through the Province, was incorporated into the Constitution of 1780, withstood the efforts of two Constitutional conventions for its abrogation, and yielded at last, more than two centuries after its first introduction.

It is a matter of recent history, that a republic founded upon a substratum of infidelity has but a short existence. The duration of one which shall disclaim the support of religious teachings, and rely upon the intelligence attendant upon universal suffrage, and the purity derived from a universal scramble for office, is a problem which has not yet received its solution.

But to leave the Puritans here would not be doing them justice on this subject. They have been charged with inconsistency, and persecution, in reference to these proceedings.

Mr. Benedict, just quoted, says further of the original order for the maintenance of the ministers, —

“From these resolutions on board this floating vessel, which by subsequent acts became a permanent law, subjecting every citizen, whatever was his religious belief, to support the ministry of the established church, and to pay all the taxes which the dominant party might impose for their houses of worship, their ordinations, and all their ecclesiastical affairs, proceeded the great mistake of the Puritan Fathers. And from the same incipient measure grew all the unrighteous tithes and taxes, the vexatious and ruinous lawsuits, the imprisonment and stripes of the multitudes who refused to support a system of worship which they did not approve.”

After other remarks of a similar character, he adds, p. 369, —

“The most charitable exposition we can give of this unpleasant subject is, that good men with bad principles were led astray; that although they were driven by persecution from their native land, and here intended to form an asylum for the oppressed who should fly to them for shelter, of every nation and of every creed; yet from the strength of habit, and the general opinions of mankind, in that age, they dare not leave the sacred cause to its own inherent influence; and the spirit of the times, rather than the disposition of the men, hurried them forward to those persecuting measures which have fixed an indelible stain on their otherwise fair name.”



Assuming the matter to be one involving a question of conscience, this might be true, if they intended to form an asylum for persons of all creeds, to come and promulgate all doctrines, even to denunciation of their own most cherished principles. But the fact being shown to be just the reverse of all this, the allegation of persecution fails, along with that of inconsistency.

A man persecutes nobody, by defending his own from encroachment. The lands within their chartered limits were theirs. The government was theirs. The faith and modes of worship were theirs. Under their grant from the Council at Plymouth and their charter from the Crown, they secured to themselves, as we have seen, substantially a fee-simple in their lands, which they could protect against all encroachments. They endeavored to secure to themselves, also, a theologic fee-simple, so to speak, or at least a life-estate, and they were exceedingly tenacious of this, and more sensitive to trespasses upon it than to trespasses upon property, in the proportion that the concerns of religion held a higher place in their estimation than mere temporal affairs. There was little temptation to commit trespasses upon their temporal fee. But there were other zealots besides themselves, who were quite desirous of becoming tenants in common, at least, if not disseisors, of their ecclesiastical fee. The attempt was promptly met, first by warning off; and when that failed, by an ecclesiastical action of trespass, resulting in a fine; and when that failed, by a process of ejectment, called a sentence of banishment.

It would be but upon a very superficial view of the subject, to say, that they had no right to do this, and that it was inconsistent with their position in England. The Puritans in England, like others there who dissented, were mostly natives of the soil: they had natural rights there,—a right to form their opinions upon religious subjects, equally with all other inhabitants of that country; an equal right to express them peaceably; a right to adopt their creed and forms of worship, according to the dictates of their consciences (even if the government might tax them); and a right to the protection and support of the government, in the enjoyment of their rights and liberties. That was their country, their home: there were their families, and their relatives, friends, all their associations. They had no other place in which to enjoy their rights. Members of the Church of

England had the same natural rights, and no more. Other dissenters from her doctrines had the same rights, and no less. The Church of England, claiming to be established by law, required conformity to her creed and usages and forms, in matters deemed by others essential errors; and hence violation of conscience, and persecution.

It was open to all who might be able, to escape from this persecution. It was natural that those who attempted it should associate for the purpose. The Puritans did so,—provided for themselves a place of refuge in the wilderness, and obtained a charter of government. This was emphatically for themselves and those who sympathized with them, and not for others. The creeds, modes, and forms of others who dissented, were as obnoxious to them as those of the Hierarchy. They were not required by any principle of religion, or morals, or comity, or benevolence, to provide for a theologic warfare against themselves and their cherished opinions on the western shore of the Atlantic; and they did not do it. They did not profess toleration. Why should they? With a perfect conviction that they were right, of course others were wrong. And error was fatal! We have as little of toleration at the present time, in relation to some other things, and with less excuse. Others who came were bound to respect their religious, equally with their civil, institutions. There was no persecution in their attempt to maintain them, by the exclusion of those who could be restrained in no other way. No one had a right to come and set up an opposition, and plead “conscience.” That plea was open to a general demurrer. “What of that!” You have no right to bring such a conscience here.

I submit that the argument is unanswerable, and a full justification of the general principle upon which the Puritans acted. We may think their creed too narrow. There was, doubtless, mistake, anger, error, excess, wrong, in individual cases. I seek not to justify such things. All I claim is a vindication of the legal and moral right of the Puritan Fathers to govern their own Commonwealth, the child of their labors, of their prayers, of their hopes, and of their fears also; and to exclude others, who could not join in fellowship with them, from the enjoyment of their privileges, without being accused of persecution.

Whether their ecclesiastical right could stand on this foundation for more than one or two generations, is another and a different question. It would, certainly, not be a very long period before those who had been born on the soil would have as great a right of non-conformity to the existing state of things, as the Puritans had in England, and upon similar grounds. They had, in fact, no theologic fee-simple, and could not transmit an inheritance in any exclusive right. They had nothing more than a life-estate, in this respect.

But the matter was not suffered to develop itself in that way. The theologic trespassers brought it to a more direct and speedy issue.

The members of the Church of England seem to have left the Puritan Fathers in the undisturbed enjoyment of their rights. They neither sought nor were involved in any controversy with them here, in the early settlement, unless the controversy respecting the charter had that aspect.

With the exception of the Quakers, the Anabaptists were the most prominent in this religious aggression.

In 1639, several persons were fined for attempting to gather a small company of believers.

A law for the banishment of Anabaptists was passed in 1644, with a preamble giving them a very bad character.<sup>1</sup>

"The heart-rending sufferings which were inflicted on John Clark, Obadiah Holmes, and others" (so Benedict characterizes the affair), in 1651, may serve to illustrate the spirit of the times. Clark, Holmes, and John Crandall, "representatives of the church at Newport," Rhode Island, came to Lynn and held a meeting at the house of a brother, on the plea that he was too old to go to Newport. Benedict says, "The circumstance of these men being representatives, leads us to infer that something was designed more than an ordinary visit." Undoubtedly! They came to do what they knew was a violation of the laws of Massachusetts. — The constable came, as might have been (probably was) expected, broke up the meeting, arrested, and took them to the ale-house, or ordinary, and being, evidently, a man zealous in the faith, and doubtless supposing that the meeting-house was a more suitable place than the ale-house for such people, — wishing also,

<sup>1</sup> Mass. Records, vol. ii. p. 85.

probably, that they should hear a little sound doctrine, — he proposed, at dinner, if they were free, to take them to the meeting. They replied, “ We are in thy hand ; and if thee will take us to the meeting, thither will we go.” But they informed him further, “ If thou forcest us into your assembly, then shall we be constrained to declare ourselves, that we cannot hold communion with them.” The zealous constable did not care for that, and so to the meeting they went. Taking off their hats at the threshold, when they were seated they put them on again, and Clark opened his book and fell to reading. The constable, by order of a magistrate, took off their hats. When the preaching and praying were over, Clark, as a stranger, stood up and desired to say a few things to the congregation. The preacher said, we will have no objections to what has been delivered. But Clark must explain his gesture of dissent (putting on his hat) ; and the explanation being, substantially, that to conjoin and act with them would be sin, and that he could not judge that they were gathered together and walked according to the visible order of the Lord, he was told he had said and done that which he must answer for, and was silenced. Shortly after, they were tried ; and, according to the account, his defence embarrassed the judges. Clark says, —

“ At length the Governor stepped up and told us we had denied infant baptism, and, being somewhat transported, told me I had deserved death, and said he would not have such trash brought into their jurisdiction ; moreover he said, you go up and down and secretly insinuate into those that are weak, but you cannot maintain it against our ministers. You may try and dispute with them.”

They were fined, and refusing to pay were imprisoned. But Clark caught at the last remark of the Governor, as if it were a challenge to a debate, and the next morning sent a formal acceptance, with a request that a time might be named ; shrewdly prefacing it with, “ Whereas it pleased this honored court yesterday to condemn *the faith and order*, which I hold and practise,” — so that the dispute might be upon his faith and order. The magistrates were not to be caught in that way, but inquired whether he would dispute upon the things contained in his sentence, &c. “ For,” said they, “ the court sentenced you not for your judgment and conscience, but for matter of fact and practice.” Clark replied, “ You say the court sentenced me for matter of fact and

practice; be it so. I say that matter of fact and practice was but the manifestation of my judgment and conscience, and I make account, that man is void of judgment and conscience, that hath not a fact and practice suitable thereunto."

The magistrates saw, doubtless, that the debate would involve his faith and his conscience, and, if allowed, that he would gain the opportunity which he desired, of promulgating his doctrines under their permission, and therefore protection, and declined to allow it. Clark's friends paid his fine, and he was discharged.

But Clark, as Benedict says, "knowing that his adversaries would attribute the failure of it [the debate] to him," immediately on his release drew up an address, reciting, that through the indulgency of tender-hearted friends, without his consent, and contrary to his judgment, the sentence had been satisfied and a warrant procured by which he was secluded the place of his imprisonment, by reason whereof he saw no call but to his habitation; yet, lest the cause should suffer, he signified that if it should please the magistrates, or the General Court, to grant his former request, he should cheerfully embrace it, and come from the island to attend to it.

The magistrates replied, that they conceived he had misrepresented the Governor's speech in saying he was challenged to dispute, adding, —

"Nevertheless, if you are forward to dispute, and that you will move it yourself to the court or magistrates about Boston, we shall take order to appoint one who will be ready to answer your motion, you keeping close to the questions propounded by yourself; and a moderator shall be appointed also to attend upon the service; and whereas you desire you might be free in your dispute, keeping close to the points to be disputed or without incurring damage by the civil justice, observing what hath been before written, it is granted; the day may be agreed if you yield the premises."

Clark took exception to the answer, and repeated his former motion, saying, if the General Court should accept it, and, under the secretary's hand, should grant a free dispute without molestation or interruption, he should be well satisfied. Benedict says, "Mr. Clark all along kept in view the law which had been made seven years before, which threatened so terribly any one who should oppose infant baptism. This was the reason of his

requesting an order to dispute in legal form." And he adds, "Mr. Clark, therefore, left his adversaries in triumph." Again, "So completely was he at home in the baptismal controversy, that he was evidently as desirous for the public discussion, as his opponents were to avoid it."

Thus it was that Mr. Clark returned to his habitation, a "persecuted" man, who had endured "heart-rending sufferings."<sup>1</sup> Judging from the fact that he came willingly and knowingly; that he was nothing loath to be forced to go to a meeting where he should be constrained to declare his dissent; that he used the trial to make an open defence of his doctrines; that he was so anxious to debate the matter afterwards with the ministers, if he could have a clear field without danger of the law; and that he finally left his adversaries in triumph;—it is at least an open question, whether the *persecution* was not more in the avoidance of the public free debate, than in the fine, and imprisonment for non-payment. He seems in all this to have had an eye to the things temporal, in regard to his controversy with Mr. Coddington, perhaps quite as much as to things spiritual.<sup>2</sup>

Clark carried his complaints to England;<sup>3</sup> and Sir Richard Saltonstall wrote to Cotton and Wilson, the ministers at Boston,—

"It doth not a little grieve my spirit to hear what sad things are reported daily of your tyranny and persecutions in New England, as that you fine, whip, and imprison men for their consciences. First, you compel such to come into your assemblies, as you know will not join you in your worship; and when they show their dislike thereof, or witness against it, then you stir up your magistrates to punish them for such (as you conceive) their public affronts. . . . We pray for you, and wish you prosperity every way; hoped the Lord would have given you so much light and love there, that you might have been eyes to God's people here, and not to practise those courses in a wilderness, which you went so far to prevent. These rigid ways have laid you very low in the hearts of the saints. I do assure you, I have heard them pray in the public assemblies, that the Lord would give you meek and humble spirits, not to strive so much for uniformity, as to keep the unity of the spirit in the bond of peace."

<sup>1</sup> Benedict, pp. 371–375; Backus's Hist. of New England, vol. i. pp. 214–228.

<sup>2</sup> See Palfrey, Hist. N. E., vol. ii. p. 359.

<sup>3</sup> Ill News from New England, Mass. Hist. Coll. 4th Series, vol. ii. pp. 3, 27.

Mr. Cotton, answering "for Brother Wilson and self," said of Holmes, "As for his whipping, it was more voluntarily chosen by him than inflicted on him. His censure by the Court, was, to have paid, as I know, £30, or else be whipt; his fine was offered to be paid by friends for him freely, but he chose rather to be whipt; in which case, if his suffering of stripes was any worship of God at all, surely it could be accounted no better than will-worship." . . .

To the other paragraph above quoted, he replied, "You know not, if you think we came into this wilderness to practise those courses here, which we fled from in England. We believe there is a vast difference between men's inventions and God's institutions; we fled from men's inventions to which we else should have been compelled; we compel none to men's inventions. If our ways (rigid ways as you call them) have laid us low in the hearts of God's people, yea, and of the saints (as you style them), we do not believe it is any part of their saintship. Nevertheless, I tell you the truth, we have tolerated in our churches some Anabaptists, some Antinomians, and some seekers, and do so still at this day. We are far from arrogating infallibility of judgment to ourselves, or affecting uniformity; uniformity God never required, infallibility he never granted us."<sup>1</sup>

These proceedings serve well to illustrate not only the religious legislation and civil administration of that period, but the spirit and temper of all parties. The Bible was the guide of the Puritans, and their law. Their legislation was founded upon it. Compelling men, therefore, to conform to their laws, was compelling them to conform, not to men's inventions, but to God's institutions.

The proceedings in reference to the "Quakers and Ranters" come under consideration, as a part of the religious legislation of the Puritan Commonwealth; and notwithstanding the matter has been discussed with great ability and research by Dr. Ellis, in the third lecture of this course, it may be proper for me, as it comes also within the scope of my subject, to say a few words upon it, instead of passing it by with a mere recognition.

Polonius, along with other very good advice to his son, Laertes, counselled him to —

"beware

Of entrance to a quarrel: but, being in,  
Bear't, that the opposed may beware of thee."

<sup>1</sup> See the letters entire, Hutch. Coll. Papers, pp. 401-407.

The people of Rhode Island happily acted upon the first part of this maxim, in reference to the Quakers who came among them. Had the Puritans done the same, it is probable that the nuisance would have been equally harmless in Massachusetts. But such a forbearance would have been wholly at variance with their principle of excluding disturbers of their peace, and with their practice of rigidly enforcing their laws. They entered, therefore, upon the quarrel sought to be fixed upon them, with an energy that made it apparent they were not unmindful of the principle embodied in the latter part of Polonius's advice.

With a commendable moderation in the outset, they evinced a rigid determination to maintain their authority. They warned, they sent away, they fined, they whipped, they imprisoned, and branded. When these more usual punishments failed, ears (not many of them) were cut off. This cruel, but in England, at that day, not very unusual, punishment was inefficient also. Then came banishment, with a condition annexed, that a return without permission was on pain of death. And when all else was utterly ineffectual, the penalty of death was inflicted.

The Federal Commissioners of the four colonies (Massachusetts, Plymouth, Connecticut, and New Haven), at their annual meeting in 1656, had recommended that such persons, if any come, should be forthwith secured or removed out of all the jurisdictions. When, two years afterwards, it was found that punishments of the milder character were of no avail, the Federal Commissioners propounded and seriously commended to the several General Courts to make a law of the precise character of that under which Massachusetts inflicted the extreme penalty.<sup>1</sup> In other instances, prior to this time, parties had been banished with a like condition, and there had been no instance of a violation of it. So it was believed would be the case in this instance. But here was a different class of offenders,—fanatical, or self-willed,—self-devoted to their will. We may call it conscience, but it was conscience as defined by the Indian, "Something here [laying his hand on his breast], which says, 'I won't.'" We may call it insanity; but, if insanity, it was of the same self-willed character.

<sup>1</sup> Palfrey, *Hist. of New England*, vol. ii. p. 469. John Winthrop, of Connecticut, attached a qualification to his subscription.



It is quite possible that something of human passion may have been excited in the magistrates of the Colony by this wanton contempt of their right and their authority. But mischief arising from mere contempt, — still less, resentment and passion consequent upon such contempt, — could furnish no justification for proceeding to the last extremity. In that view the most that could be said in extenuation would be, that there was a successful courting of martyrdom by a series of persistent efforts, and under circumstances which rendered it next to impossible for the government to refuse the crown. That the Quakers, supposing them to be sane, richly deserved any suitable punishment for disturbing the peace, is not to be doubted.

The cry of persecution of the Quakers by the Puritans has been long and often repeated. It is within a few days, that I saw, in a notice of a sombre work, entitled "New-England Tragedies," this paragraph: "They [the Puritans] persecuted the Quakers with immense zest and activity; but it cannot be denied that the Quakers gave great provocation."

Now I take a direct issue with the first part of this allegation, and with all other averments that the Puritans of Massachusetts persecuted the Quakers. Let us bear in mind that it was not for non-conformity that the Quakers were prosecuted; and let us understand the significance of the terms we use. What is *persecution*? If we turn to the great work of our late learned and most worthy associate, Dr. Worcester, we shall find a satisfactory definition; and tried by that standard, or by any other entitled to regard, I maintain, without hesitation, that so far from the Puritans persecuting the Quakers, it was the Quakers who persecuted the Puritans. Pardon me, if I consider this somewhat in detail.

There was no pursuit either "with malignity or enmity" in the proceedings of the magistrates, even if anger occasioned by such persistent annoyance may have been excited. The Puritans did not "harass" the Quakers "with penalties." The Quakers harassed the Puritans, and the Puritans inflicted penalties for the transgression of their laws, as other communities inflict penalties for transgressions. There must be something more than this to constitute persecution, or the tenants of our state prisons may cry out, persecution! So again, it was not the Puritans who

"afflicted," "distressed," "oppressed," and "vexed," the Quakers, on account of their opinions; but the reverse of all that.

Wenlock Christison, the last person upon whom sentence of death was passed, is reported by Sewell, in his History of the Quakers, to have said to the court, "If ye have power to take my life from me, God can raise up the same principle of life in ten of his servants, and send them among you in my room, that you may have torment upon torment, which is your portion; for there is no peace to the wicked, saith my God." That states the truth of the matter, so far as persecution is concerned. The Puritans had no peace, but "torment upon torment" from the Quakers.

The only reasonable question which can arise, is, Were the Puritans justified in the infliction of the extreme penalties? That the Quakers harassed, afflicted, distressed, oppressed, and vexed them, may not be a sufficient justification for that.

Was there danger to the Puritan Commonwealth,—danger of its overthrow,—danger of the subversion of the principles upon which it was founded? Every other expedient to rid themselves of the nuisance had been tried in vain; and this punishment was denounced as the penalty for a return from banishment, in the hope and expectation that its terror would be effectual, and render its infliction unnecessary.

When this proved otherwise; when their principles were denounced, their authority derided and defied, their peace disturbed, and they were dared to carry into execution their own decrees,—if there was danger to their institutions, what course ought the magistrates to have adopted?

The Quakers courted death, if the Puritans dared to inflict it. They despised and rejected the mercy which would have saved them. Assuming that they were sane, however much we may lament the occurrence, why should we waste our sympathies on them, if, by their proceedings, they endangered the Commonwealth into which they intruded? It is said now, that they were more fit subjects for an insane hospital than for any of the punishments which were inflicted. If they were insane, we cannot hold the Puritans responsible because we have discovered that fact two centuries afterwards. There was no such supposition at the time, neither was there an insane hospital.

Great odium has been cast upon the law and its administration, in the infliction of those extreme punishments, and upon the clergy, so far as they participated. I submit, whether the responsibility is not chargeable rather upon the lamentable state of medical science at that time, which, while busying itself with catnip and elecampane, millipedes and powder of baked toads, had not discovered that there was any other form of mental disease than that which manifested itself in a furious derangement. How should lawgivers, judges, and jurors, or clergymen even, ascertain the fact of insanity,—a matter so foreign to their ordinary studies,—when the studies and diagnosis of the physician failed to perceive it. Medical science at a much later day, under the lead of jurisprudence, has redeemed its character. The medical profession having left the investigation of the virtues of baked toad-powder for that of the phenomena of mental disease, the law seeks information on that subject, in aid of its administration.

Medical testimony is heard on the question, sane or insane? Medical experts give their opinions, and the interests of humanity are subserved, and the cause of justice often promoted; though it must be acknowledged, that the notion of mental derangement is carried to an extreme, when a jury finds a defendant sane the moment immediately before, and sane again the moment immediately following, the commission of a very deliberate homicide, but insane at the precise moment when the deed was committed. I admit that the Bench deserves censure, when it fails to rebuke such a perversion of principles. But it would be unreasonable to expect too much from a judiciary elected by a popular vote, and whose tenure of office is for a short term of years.

Upon the question whether their institutions were endangered by the Quakers, the Puritans are entitled to be heard.

In a humble petition and address of the General Court, presented to the King in February, 1660, it is, among other things, said,—

“Concerning the Quakers, open, capital blasphemers, open seducers from the Glorious Trinity, the Lord’s Christ, our Lord Jesus Christ, &c., the blessed Gospel, and from the Holy Scriptures as the rule of life, open enemies to government itself as established in the hands of any

but men of their own principles, malignant and assiduous promoters of doctrines directly tending to subvert both our churches and state; after all other means, for a long time used in vain, we were at last constrained, for our own safety, to pass a sentence of banishment against them, upon pain of death. Such was their dangerous, impetuous, and desperate turbulency, both to religion and to the state, civil and ecclesiastical, as that, how unwilling soever, could it have been avoided, the magistrate at last, in conscience both to God and man, judged himself called, for the defence of all, to keep the passage with the point of the sword held toward them. This could do no harm to him that would be warned thereby; their wittingly rushing themselves thereupon was their own act, and we, with all humility, conceive a crime bringing their bloods upon their own head."<sup>1</sup>

Assuming this representation to be true, the colonists must stand excused.

Dr. Palfrey says, — "Imprudently calculating on the effect of their threats, the Court had placed themselves in a position which they could not maintain without grievous severity, nor abandon without humiliation and danger. For a little time there seemed reason to hope that the law would do its office without harm to any one."

Again, — "Whether or not their imaginations had exaggerated the original danger, it could no longer, after an experiment of more than three years, be justly considered great."

And again, — "But among the colonies of New England, it is the unhappy distinction of the chartered — and therefore at once more self-confident and more endangered — colony of Massachusetts, to have been the only one in which Quakers who refused to absent themselves were condemned to die. Her right to her territory was absolute, deplorable as was the extreme assertion of it. No householder has a more unqualified title to declare who shall have the shelter of his roof, than had the Governor and Company of Massachusetts Bay to decide who should be sojourners or visitors within their precincts. Their danger was real, though the experiment proved it to be far less than was at first supposed. The provocations which were offered were exceedingly offensive. It is hard to say what should have been done with disturbers so unmanageable. But that one thing should not have been done till they had become more mischievous, is plain enough. They should not have been put to death. Sooner than put them to death, it were devoutly to be wished that the annoyed dwellers in Massachusetts had opened their hospitable drawing-

<sup>1</sup> Mass. Records, vol. iv. part i. p. 451.

rooms to naked women, and suffered their ministers to ascend the pulpits by steps paved with fragments of glass bottles."<sup>1</sup>

But if the danger of the civil Commonwealth was not extreme, that of the religious government connected with it was imminent. If the Quakers might contravene and defy the laws which protected the religious institutions and worship of the Puritans, all others might do the same. Their peculiar religious government was thus in extreme peril. With regard to that, the controversy was preservation or destruction; and the result was the latter.

The infliction of the punishment of death did not avail. The Quakers had an indomitable perseverance, and much encouragement to continue the contest. The law inflicting this penalty had passed but by a majority of one. There was much opposition to its execution. The military guard shows the fear which existed of an outbreak. The opposition was such that the government gave up any farther attempt to execute the extreme penalties. The Quakers came in greater numbers, and committed greater extravagancies. The government mitigated the penalties, and finally submitted to the intrusion. The Quakers triumphed;—and the experiment of the Puritans,—the theologic freehold,—the Commonwealth which was to exclude unsound doctrine and practice,—failed then and there,—and, so far as we can perceive, from that time forth, for evermore.

The civil government did not fail, the religion did not fail; but the principle of the legal exclusion of error received a fatal blow.

The failure was not merely because the Quakers had conquered, but by reason of the causes through which they had conquered.

I quote from Dr. Palfrey once more, p. 482,—

"It was settled that the Governor and Company of Massachusetts Bay were not to have the disposal of their home. They had bought it, and paid dear for it. They had on their side that sort of rigid justice which accredited writers recognize, when they lay down the rule that a perfect right may be maintained at any cost to the invader. But trespassers had come who would not be kept away, except by violent measures, which had

<sup>1</sup> Palfrey's *New England*, vol. ii. pp. 474, 476, 484.

produced only a partial effect, and which the invaded could not prevail upon themselves any longer to employ. The feeling of humanity, which all along had pleaded for a surrender, at length uttered itself in overpowering tones."

And Sir Ferdinando Gorges, in his "Brief Narration of the Original Undertakings of the Advancement of Plantations into the Parts of America," published in 1658, speaking of the charter, says, —

"By the authority whereof the undertakers proceeded so effectually, that in a very short time numbers of people of all sorts flocked thither in heaps, that at last it was specially ordered by the King's command, that none should be suffered to go without license first had and obtained, and they to take the oaths of supremacy and allegiance. So that what I long before prophesied, when I could hardly get any for money to reside there, was now brought to pass in a high measure. The reason of that restraint was grounded upon the several complaints, that came out of those parts, of the divers sects and schisms that were amongst them, all condemning the public government of the ecclesiastical state. And it was doubted that they would, in short time, wholly shake off the royal jurisdiction of the Sovereign Magistrate."<sup>1</sup>

We can see now that it was impossible that their peculiar religious institutions, — "God's institutions," as Mr. Cotton called them, — should be maintained for a long period against the influx of population "condemning the public government of the ecclesiastical state" here: we can see that it would have been better, (to use a common form of speech), infinitely better, had they voluntarily yielded to the pressure, at an earlier day, and quietly submitted to a modification of their religious establishment, giving greater liberty for dissent, and more tolerance to opposition. The civil state can hardly be said to have been in danger of overthrow. It may not have been wise, it may not have evinced sound statesmanship, for them to attempt to maintain their experiment against the intrusion of the Quakers, considering the opposition which was made to it.

If, under the existing circumstances, they saw the impending inevitable consequences, they cannot be held excused in sacrificing life to the end that their church polity might be vigorously enforced for a little time, only to be overthrown within a short

<sup>1</sup> Mass. Hist. Soc. Coll., 3d Series, vol. vi. p. 80.

period. Anger and passion, under great provocation, can afford at best but palliation.

But, assuming that there was no danger to their civil government, the principle which lay at the foundation of their whole government, civil as well as ecclesiastical,—the principle of excluding what they deemed fundamental error in religion by the civil arm,—was on trial; and if, on the other hand, they might well believe, and did believe, that God's institutions committed to their charge could be sustained, error excluded, their peace preserved, and their peculiar Commonwealth maintained, by the rigid enforcement of their laws, even unto death, the danger which menaced their institutions from the proceedings of the Quakers must hold them excused. On what authority shall we pronounce that they must have seen the first, and could not have acted upon the last, of these propositions?

Their Commonwealth was one of small beginnings. If it could have been kept a small Commonwealth,—distinct and independent, its religious legislation enforced as it might have been under such circumstances,—it would, doubtless, have preserved its original constitution much longer; and with their knowledge of the mutability of human affairs, they could not have anticipated that it was to endure for all generations. They were authorized originally, by the circumstances to which I have referred, to anticipate for it a reasonable duration, and they were men who could commit to God's providence the ordering of the future. The extract from Sir Ferdinando Gorges' "Brief Narration" shows that they did not anticipate that the example of their emigration would be followed by such a numerous company of men, who, of divers sects and with divers schisms, "contemning the public government of the ecclesiastical state," claimed liberty, not so much to worship God according to the dictates of their consciences, as liberty not to worship Him at all.

There is a grave question, I think, not as yet sufficiently considered, how far writers of fiction, whether of prose or poetry, are at liberty to represent historical personages otherwise than on the basis of historical truth.

If the fiction be like Irving's *Knickerbocker's New York*,—a burlesque so transparent that no one is for a moment misled,—there is no harm done. But if the tale or poem be of that

character that no one but an expert in history can distinguish between the true and the false, the fact and the fiction, very serious injury may be, in many instances will be, done to the reputation of those who have bequeathed that reputation to posterity, in the hope that it may be preserved untarnished. More especially is this true, if, the prologue says, —

“ the author seeks and strives  
To represent the dead as in their lives.”

It is well for the author of the “New-England Tragedies” that the Puritan laws are no longer in force, else he might be called to answer, not only for that he did —

“ perchance misdate the day and year,  
And group events together by his art,  
That in the Chronicles lie far apart,”

but that he did, moreover, interpolate matter which had neither day, nor year, nor chronicle, in point of fact, thereby giving false impressions respecting the truth of history.

The relation of events in their order is one of the first of the requisites of history. Not only the year, but sometimes the very day in which a thing is done, is of the utmost importance to a right understanding of the character of men, and of their acts also.

It is not an immaterial matter, whether the Puritans forbore, at last, to proceed capitally against the Quakers from their own conviction that such a course would cause a great sacrifice of life, and would finally fail of accomplishing their object; or whether, thirsting for blood still, they were stopped by a “mandamus” from Charles II.,— who, by the way, had no power to issue such a judicial writ, even if he might amend the charter.

It may not be amiss, therefore, to state, that the last execution, that of William Leddra, took place March 14, 1661; that Wenlock Christison, or, as the record has it, Wendlock Christopherson, who had been banished and threatened with death if he should return, confronting the judges on Leddra’s trial with, “I am come here to warn you, that you shed no more innocent blood,” was arrested, and, after three months, brought up for trial. Dr. Palfrey says, —



"There was an unprecedented division among the magistrates, and they are said to have been no less than two weeks in debate." — "Christison was condemned to die; but the dreadful sentence could not again be executed. In the mean time, the General Court had met; and the evidences of opposition to any further pursuance of this rigorous policy were unmistakable. The contest of will was at an end. The trial that was to decide which party would hold out longest, had been made; and the Quakers had conquered."<sup>1</sup>

It may be proper for me to add, that Christison, concluding that, if he might have his liberty, he had freedom to depart, was discharged from prison in June, 1661; that King Charles's letter, directing "that, if there were any of those people called Quakers amongst them, now already condemned to suffer death or other corporal punishment, or that were imprisoned and obnoxious to the like condemnation, they were to forbear to proceed any further therein," and should send such persons to England for trial, was dated Sept. 9th, of that year, and received in November. Dr. Palfrey says further: —

"The command, however, produced little effect. The resolution to abstain from further capital punishments had been taken some months before; though the magistrates perhaps were not indisposed to appeal to the King's injunction, rather than avow a change of judgment on their own part."<sup>2</sup>

And it is of some importance to know farther, that, after a representation from the government of the colony to the King on this subject, his Majesty, in a letter dated June 28th, 1662, after saying, that "the end and foundation of the charter was and is the freedom and liberty of conscience," and charging and requiring that freedom and liberty be duly admitted and allowed, so that the "Book of Common Prayer" might be used, and all persons of good and honest lives and conversations be admitted to the sacraments and their children to baptism, adds, —

"We cannot be understood hereby to direct or wish that any indulgence should be granted to those persons commonly called Quakers, whose being inconsistent with any kind of government. We have found it necessary, by the advice of our Parliament here, to make sharp laws against them, and are well contented that you do the like there."

<sup>1</sup> Palfrey, vol. ii. p. 481.

<sup>2</sup> Palfrey, vol. ii. pp. 519, 520.

This is the King's final judgment on the matter.<sup>1</sup>

A few days since, a leading newspaper in a neighboring State appended to a courteous notice of this course of Lectures, a very uncourteous paragraph respecting the founders of Massachusetts, saying, that —

“They were simply a band of narrow-minded sectaries, animated by no broad nor generous motives; but aiming to establish a morose and exclusive community, from which every one of broader sympathy and more tolerant spirit should be rigorously shut out.”

And then, naming three of the principal men among them, it was said, —

“that, so far from being the promoters of a great movement, they prove, on examination, of very moderate calibre. They were designed for village deacons, rather than for founders of states.”

One cannot, and has no disposition to, repress a smile at language like this.

It is neither my duty nor my privilege, at this time, to enter into a discussion respecting the statesmanship of the founders of Massachusetts. But it lies within my province to say here and now, that, but for the religious legislation of the founders of Massachusetts, many persons would have come here, who, like some of those who went to Rhode Island, were not fit for village deacons, nor for any other honest and honorable position.

A clerical friend of mine, in a sermon last Thanksgiving Day, referring to the Puritan Commonwealth and the disturbances by Roger Williams and others, happily remarked, that “every Utopia ought to be supplemented with a Narragansett.”

Their experiment of founding and maintaining a civil state upon a basis which should support the worship of God according to the dictates of their conscientious convictions of duty, and an ecclesiastical state combined which should be in harmony with it, and of excluding whatever was antagonistic to its welfare, failed in its exclusiveness; but the change was only in the admission of the element of a more extended liberty of conscience; and of what is dignified by that name without its

<sup>1</sup> Mass. Records, vol. iv. part ii. p. 165; Hutch. Coll. Papers, p. 379.

vitality; with greater liberty also of action. Their failure was partial only; their success, great and enduring.

With an intelligent appreciation of its true principles, they laid here the foundation of civil liberty upheld by law and restrained by law, and of a system of impartial justice.

In the "Body of the Liberties," enacted in 1641, is a prefatory declaration, that—

"We do, therefore, this day, religiously and unanimously, decree and confirm these following Rights, liberties, and privileges, concerning our Churches, and Civil State, to be respectively, impartially, and inviolably enjoyed and observed throughout our jurisdiction for ever."

The first and second declarations following this, are, of themselves, a Massachusetts Magna Charta.

"1. No man's life shall be taken away, no man's honor or good name shall be stained, no man's person shall be arrested, restrained, banished, dismembered, nor any ways punished, no man shall be deprived of his wife or children, no man's goods or estate shall be taken away from him, nor any way indamaged under color of law or Countenance of Authority, unless it be by virtue or equity of some express law of the Country warranting the same, established by a General Court and sufficiently published, or in case of the defect of a law in any particular case, by the word of God. And in Capital cases, or in cases concerning dismembering or banishment according to that word to be judged by the General Court."

"2. Every person within this jurisdiction, whether Inhabitant or foreigner, shall enjoy the same justice and law that is general for the plantation, which we constitute and execute one towards another, without partiality or delay."<sup>1</sup>

The main principle of these declarations is recognized in the constitutions of the States, and of the United States. If it shall be abandoned, and the theory substituted that the general government is to be administered according to the will of the people, as ascertained, from time to time, by the action of Congress, civil liberty in the United States will receive a shock, from which it will never recover under that government.

With a profound conviction of the truth and of the vital importance of their religious principles, they achieved and secured to themselves liberty to worship God according to the dictates

<sup>1</sup> Mass. Hist. Society's Coll. 3d Series, vol. viii. p. 216.

of their consciences. 'They disclaimed again and again power over the faith and consciences of others. If they were pertinacious in their determination that those who could not join at least in attendance upon their religious worship, and especially that those who placed themselves in hostility to their principles and practice, should find their liberty elsewhere, — their efforts to secure liberty for themselves have resulted in a larger liberty to all others.

With the rod of a persevering industry, they smote the rock of Massachusetts, literally lying in the wilderness; and if the elements of prosperity existing within did not gush forth in immediate profusion, they have since flowed in copious streams to sustain and enrich their descendants.

Let not the conclusion that the Puritans founded their State in order that they might worship God according to the dictates of their own consciences, without admitting others to disturb their worship by contention about doctrines and ordinances, detract from the high estimation in which they have been held, heretofore.

Let us not even presume to believe that they would have effected a better work, had they attempted to provide entire liberty for what every man, woman, and child deemed the dictates of their several consciences.

We are not authorized to say that it would have been better if they had founded a colony on the shores of Massachusetts, with what we call liberty of conscience, — liberty for every one not only to think as he pleases, which the Puritans allowed, but liberty for every one to preach, and harangue, and vituperate, and denounce every other one who differs and dissents from his or her particular notion, — liberty to women to hold conventions, and make pretty invectives against government, and liberty to others to denounce the Constitution which is, or should be, the organic law. All this is supposed to be safe for us. Would it have been safe for them? On what premises shall we maintain such a position? Nay, upon what data shall we persuade ourselves that, forming their infant settlement upon such a foundation, their Patmos would not have been turned into a Pandemonium, — that their experiment would not have proved a disastrous failure in its very inception?

Above all, let us not stultify ourselves by the superlative folly of regarding the Puritans as "a band of narrow-minded sectaries, animated by no broad nor generous motives," who aimed "to establish a morose and exclusive community, from which every one of broader sympathy and more tolerant spirit should be rigorously shut out." Exclusion of the promoters of contention is not the exclusion of persons of the broadest sympathy and the widest toleration.

Let us have a correct understanding of what the Puritans were in their day, which will lead us to very different conclusions.

They were non-conformists. It was their non-conformity, religious and civil, which brought them hither, to establish the principles of their non-conformity, in a colony to be based on the very foundations of their non-conformity.

Thirty years after the death of John Wycliffe, the Council of Constance condemned his opinions and writings; and decreed that his memory should be pronounced infamous, and that his bones, if to be distinguished from those of the faithful, should be removed from the consecrated ground, and cast upon a dunghill. Thirteen years subsequently, in pursuance of this sentence, his remains were taken from their place and burned; and the ashes were cast into the Swift, a brook which empties itself into the Avon.

"The Avon to the Severn runs,  
The Severn to the sea,  
And Wycliffe's dust shall spread abroad,  
Wide as the waters be."

Many of you recollect those beautiful lines. You know who repeated them, with a reference to the blood of Kossuth, if it should be shed by the Emperor of Russia.

Who was John Wycliffe? A non-conformist,— "The morning star of the Reformation,"—the original and type of the non-conformists who, denying the supremacy of King and bishops, as he denied that of the Pope, kindled the spark of civil and religious liberty in England; who cherished and fostered it in the wilderness, until, increasing and extending its beneficent warmth, it shot forth such a light, that the fires of persecution paled before its radiance.

Sneers about village deacons cannot tarnish the reputation of

such men. Detractors may think to cast their dust upon the waters; but, like that of Wycliffe, it "shall spread abroad, wide as the waters be."

If the liberty which they claimed and secured, was, in their day, confined in a great measure to themselves and their institutions; after generations have had the benefit of an expansion of its principles into a more extended freedom.

We may reject their creed. We may regret their austerity. But they will live in history, as they have lived, the very embodiment of a noble devotion to the principles which induced them to establish a colony, to be "so religiously, peaceably, and civilly governed," as thereby to incite the very heathen to embrace the principles of Christianity.



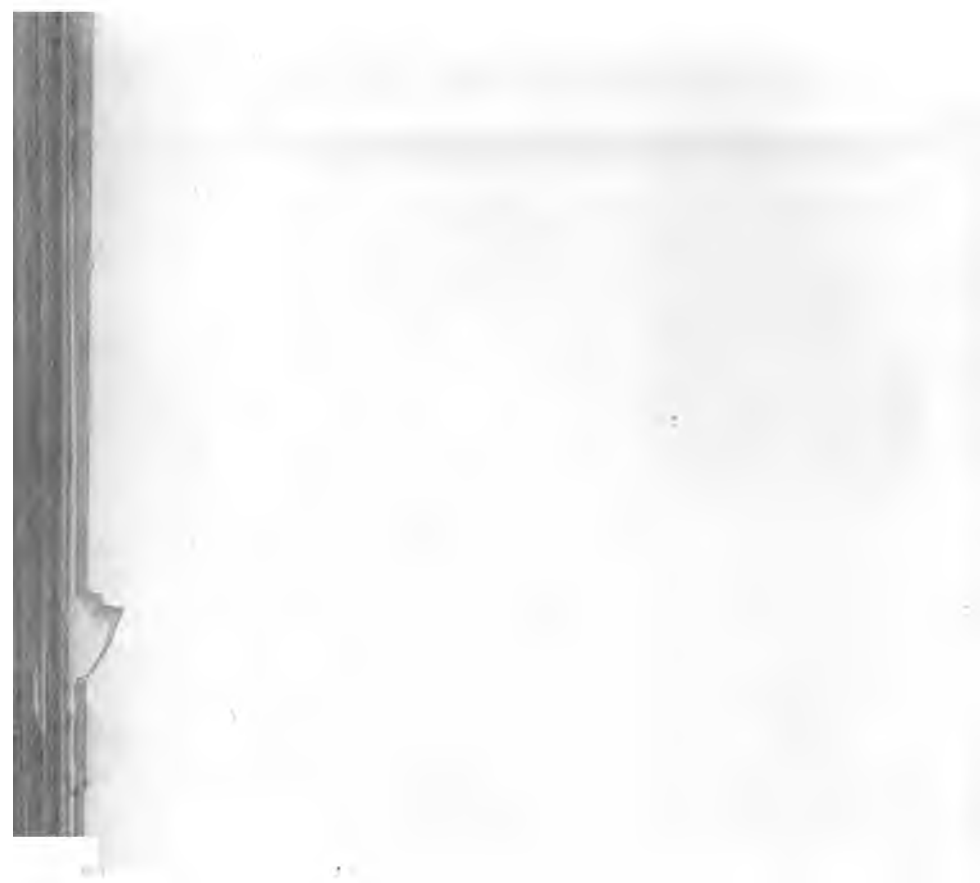




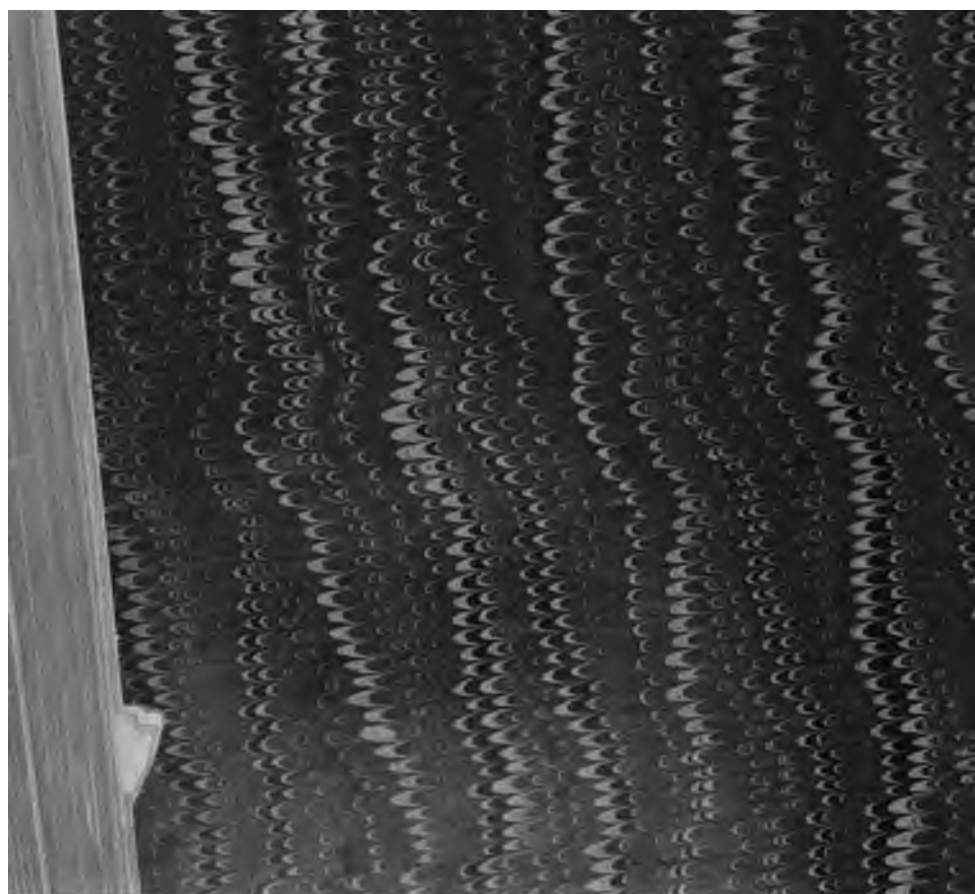












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